Indian Claims Commission

Kahkewistahaw First Nation

Report on: 1907 Reserve Land Surrender Inquiry

February 1997

ERRATUM

The following text needs to be inserted between the bottom of page 101 and the top of page 102:

surrender fiduciary obligation with respect to the disposition of the mineral rights since they were considered to be of minimal value at the time of the surrender. Once the rights had been conveyed to the DVLA, any post-surrender fiduciary obligation of the Department of Indian Affairs was terminated and the Crown had no further obligation to deal with the land for the benefit of the Band.

At the Supreme Court of Canada,[190] the Court was divided 4-3 on the question whether the mineral interests were included in the 1945 surrender for sale or lease. Nevertheless, the Court unanimously held that the Crown owed a post-surrender fiduciary obligation to dispose of the surrendered land in the best interests of the Band. The Court further found that the Crown had breached this obligation by "inadvertently" selling the mineral rights in the reserve lands to the DVLA and by failing to use the Crown's power to cancel the "inadvertent" sale

Indian Claims Commission

Commission des revendications des Indiens

February 26, 1997

Chief and Council
Kahkewistahaw First Nation

The Honourable Ron Irwin
Minister of Indian Affairs and Northern Development

The Honourable Allan Rock
Minister of Justice and Attorney General of Canada

Re: Kahkewistahaw First Nation
1907 Surrender Claim

The Kahkewistahaw First Nation initiated proceedings before this Commission by letter dated May 26, 1994, from Stephen Pillipow, counsel for the Kahkewistahaw First Nation, to the Commissioners of the Indian Claims Commission. On September 2, 1994, the Commission advised the Government of Canada and the Chief and Council of the Kahkewistahaw First Nation that it would conduct an inquiry into Canada's rejection of the specific claim of this First Nation.

This inquiry deals with the alleged impropriety of the 1907 surrender of approximately three-quarters of the Kahkewistahaw Indian Reserve located on the banks of the Qu'Appelle River in southern Saskatchewan. In the course of our deliberations, the Commission reviewed hundreds of pages of documents related to this inquiry and conducted an information-gathering session at the Kahkewistahaw Reserve on May 3, 1995. On February 1, 1996, the Commission heard oral submissions from counsel for the parties on the legal issues raised in this inquiry.

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Our review of the historical background of this claim and our analysis, findings, and recommendation are contained in the attached report which we are now honoured to present to you.

FOR THE INDIAN CLAIMS COMMISSION

Roger Augustine

P. E. James Prentice, QC Commission Co-Chair	Roger J. Augustine Commissioner

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE 1907 RESERVE LAND SURRENDER CLAIM OF THE KAHKEWISTAHAW FIRST NATION

PANEL

Commission Co-Chair P.E. James Prentice, QC
Commissioner Roger J. Augustine

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Bruce Becker / Kim Kobayashi

To the Indian Claims Commission
Ron S. Maurice / Kim Fullerton / Kathleen Lickers

February 1997

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APPENDIX A

KAHKEWISTAHAW FIRST NATION 1907 SURRENDER INQUIRY

1	Decision to conduct inquiry	August 31, 1994
2	Notices sent to parties	September 2, 1994
3	Planning conference	February 1, 1995
4	Community and expert sessions	May 3, 1995

The Commission heard from the following witnesses: elders Mervin Bob, Joseph Crowe, Steven Wasacase, George Wasacase, Charles Buffalocalf Sr, Margaret Bear, and Ernest Bob, and expert witness David Hoffman. The session was held at the Education/Sports Complex, Kahkewistahaw Reserve, Broadview, Saskatchewan

5	Legal argument	February 1, 1996

6 Content of formal record

The formal record for the Kahkewistahaw First Nation Inquiry consists of the following materials:

- 18 exhibits tendered during the Inquiry, including the documentary record (4 volumes of documents with annotated index)
- written submissions of counsel for Canada and the claimants
- transcripts of the community session and legal argument (2 volumes)
- correspondence among the parties and the Commission

The report of the Commission and letters of transmittal to the parties will complete the formal record of this Inquiry.

. . . although I am most anxious that the views of the people of Broadview should be met, still from my position as Indian Agent I am bound in the interests of the Indians to point out the difficulties in the way, which are tersely these. If these lands are surrendered by the Indians, no reasonable money value can recompense them, as their Hay lands would be completely gone, and this would necessitate no further increase of stock, which would of course be fatal to their further quick advancement, and would be deplorable. . . .

– Indian Agent Alan McDonald, March 10, 1891

PART I

INTRODUCTION

On August 20, 1881, the Government of Canada completed the survey of Indian Reserves 72 and 72A for the Kahkewistahaw Band[1] under the terms of Treaty 4. As originally drawn, these reserves were located some 130 kilometres east of Regina on the southern escarpment of the Qu'Appelle Valley and the adjoining uplands. The two reserves consisted of 46,816 acres, or sufficient land for 365 people under the terms of the treaty.

Twenty-two years later, on January 28, 1907, the Government of Canada procured a surrender of 33,281 acres from those reserves, effectively depriving the Kahkewistahaw Band of close to three-quarters of the land that it had accepted in 1881.[2] That surrender resulted in the disposition of most of Kahkewistahaw's arable land, with the remaining land being almost completely unsuited for cultivation. In effect, the Kahkewistahaw First Nation was left to survive on the steep escarpment and lower benches of the Qu'Appelle Valley.

In 1908 and 1910, the surrendered lands were sold at public auction to the non-Indian farmers who had long coveted them, and the few remaining unsold parcels were later distributed as part of the soldier settlement scheme following the First World War. It is unclear, although doubtful, whether the full amount of the proceeds from these sales was ever paid to the First Nation.[3]

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[1] Alternatively referred to as "Kahkewistahaw," the "First Nation," or the "Band," depending on the historical context.

[2] Surrender No. 548, Kahkewistahaw Indian Reserve (IR) No. 72, January 28, 1907, National Archives of Canada [hereinafter NA], RG 2, Series 1, March 4, 1907 (ICC Documents, pp. 269-73).

[3] It should be noted that the administration of the sale proceeds is not at issue in these proceedings.

At issue in this inquiry is the propriety of that 1907 surrender. By necessity, this claim has taken our Commission back to the overzealous implementation of the federal government's surrender policy of that time. The application of that policy in this case was intended to pry from the Kahkewistahaw people the valuable farming lands accepted by them under the terms of Treaty 4, and in our view it surely marked the moral low ebb in the relationship between aboriginal and non-aboriginal Canadians on the western prairies. For all Canadians, there can be only shame in those events and in the application of that policy to the Kahkewistahaw First Nation. This Commission's report provides the Canadian government with an opportunity to accept responsibility for these events and, it is hoped, to bring a just and fair resolution to this historical grievance of the Kahkewistahaw people.

On March 2, 1989, the Kahkewistahaw First Nation submitted a claim under the federal Specific Claims Policy seeking "recognition of [its] claims and compensation for the losses and damage sustained" as a result of the 1907 surrender.[4] In response to this submission, the Specific Claims Branch of Indian Affairs undertook a review of the claim, which was completed in January 1992.[5] That research was presented to Kahkewistahaw in a meeting on April 14, 1992, following which the First Nation submitted an update to its position.[6]

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[4] William J. Pillipow, Barrister & Solicitor, to P. Cadieux, Minister, Department of Indian Affairs, March 2, 1989 (ICC Documents, p. 465).

[5] Department of Indian Affairs, "Specific Claims Branch Review of Kahkewistahaw Band's Claim Concerning the 1907 Surrender," January 1992 (ICC Documents, pp. 649-752).

[6] William J. Pillipow, Pillipow & Company, to Jeannie Jeffers, Specific Claims Branch West, April 28, 1992, enclosing "Summary of Legal Position of Band," undated (ICC Documents, pp. 754-72).

Two years later, on receiving advice that Canada's preliminary position was that the 1907 surrender did not give rise to a lawful obligation to Kahkewistahaw, the First Nation formally requested that the Commission conduct an inquiry into this claim. Although Kahkewistahaw provided Canada with a further supplemental submission in response to the preliminary rejection of the claim,[7] Canada reiterated that it had breached no duties to the First Nation.[8] Ultimately, on August 31, 1994, the Commission decided to conduct this inquiry.[9]

Kahkewistahaw has alleged that the surrender obtained by Canada in 1907 was not valid because of the presence of duress, undue influence, and negligent misrepresentation, and because the surrender bargain was unconscionable. The First Nation has also alleged that the surrender was invalid because Canada failed to comply strictly with the requirements of the *Indian Act,* breached its fiduciary obligation to the First Nation by the manner in which it obtained the surrender, and violated a requirement of Treaty 4 by failing to obtain the consent of all Kahkewistahaw members interested in the reserve.

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[7] Stephen Pillipow, Pillipow & Company, to Jack Hughes, Specific Claims West, June 30, 1994, enclosing Pillipow & Company, "Supplemental Submission to the Minister of Indian Affairs and Northern Development, Kahkewistahaw First Nation Specific Claim - Land Surrender of 1907," June 1994 (ICC Documents, pp. 776-801).

[8] Jack Hughes, Senior Claims Advisor, Specific Claims West, to Chief Louis Taypotat and Council, Kahkewistahaw First Nation, August 10, 1994 (ICC Documents, pp. 858-59); Stephen Pillipow, Pillipow & Company, to Jack Hughes, Senior Claims Advisor, Specific Claims West, August 11, 1994 (ICC Documents, p. 860); Jack Hughes, Senior Claims Advisor, Specific Claims West, to Stephen Pillipow, Pillipow & Company, August 25, 1995 (ICC Documents, p. 861). The date on this last document would appear to be in error, with August 25, 1994, being more likely.

[9] Dan Bellegarde and James Prentice, Co-Chairs, Indian Claims Commission, to Chief and Council, Kahkewistahaw First Nation, September 2, 1994; Dan Bellegarde and James Prentice, Co-Chairs, Indian Claims Commission, to Ron Irwin, Minister of Indian and Northern Affairs, and Allan Rock, Minister of Justice and Attorney General, September 2, 1994.

In reply, Canada has denied that the legal doctrines of duress, undue influence, unconscionable bargain, or negligent misrepresentation are applicable to *Indian Act* surrenders. Alternatively, even if those doctrines are generally applicable in the surrender context, Canada has denied that the necessary facts exist to support a finding that duress, undue influence, unconscionability, or negligent misrepresentation occurred in this case. Canada has further asserted that the *Indian Act* surrender requirements were essentially complied with; there was no pre-surrender fiduciary obligation under the circumstances of this surrender; even if such a fiduciary obligation existed, it was complied with in any event; and the *Indian Act* surrender requirements were a reasonable expression of the Treaty 4 provision concerning band consent to disposition of reserve lands.

For the reasons that follow, we agree with the Kahkewistahaw First Nation that the Government of Canada breached fiduciary obligations owed to these aboriginal people. The government not only failed in its obligation to protect the Kahkewistahaw Band but served in fact as a cunning intermediary in procuring a surrender that can only be described as unconscionable and tainted in its concept, passage, and implementation.

MANDATE OF THE INDIAN CLAIMS COMMISSION

The mandate of this Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where that claim has already been rejected by the

Minister. . . ."[10] The role of the Commission in this inquiry is to determine whether the claim of the Kahkewistahaw First Nation should be accepted by Canada for negotiation under the Specific Claims Policy. This policy, outlined in the 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government. A "lawful obligation" specifically includes claims based on "[a] breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder."[11]

Our task in the present inquiry is to assess the validity of Kahkewistahaw's claim in light of the Specific Claims Policy. In short, the issue is to determine whether Canada owes an outstanding lawful obligation to the First Nation arising out of the circumstances of the 1907 surrender. We have concluded that it does.

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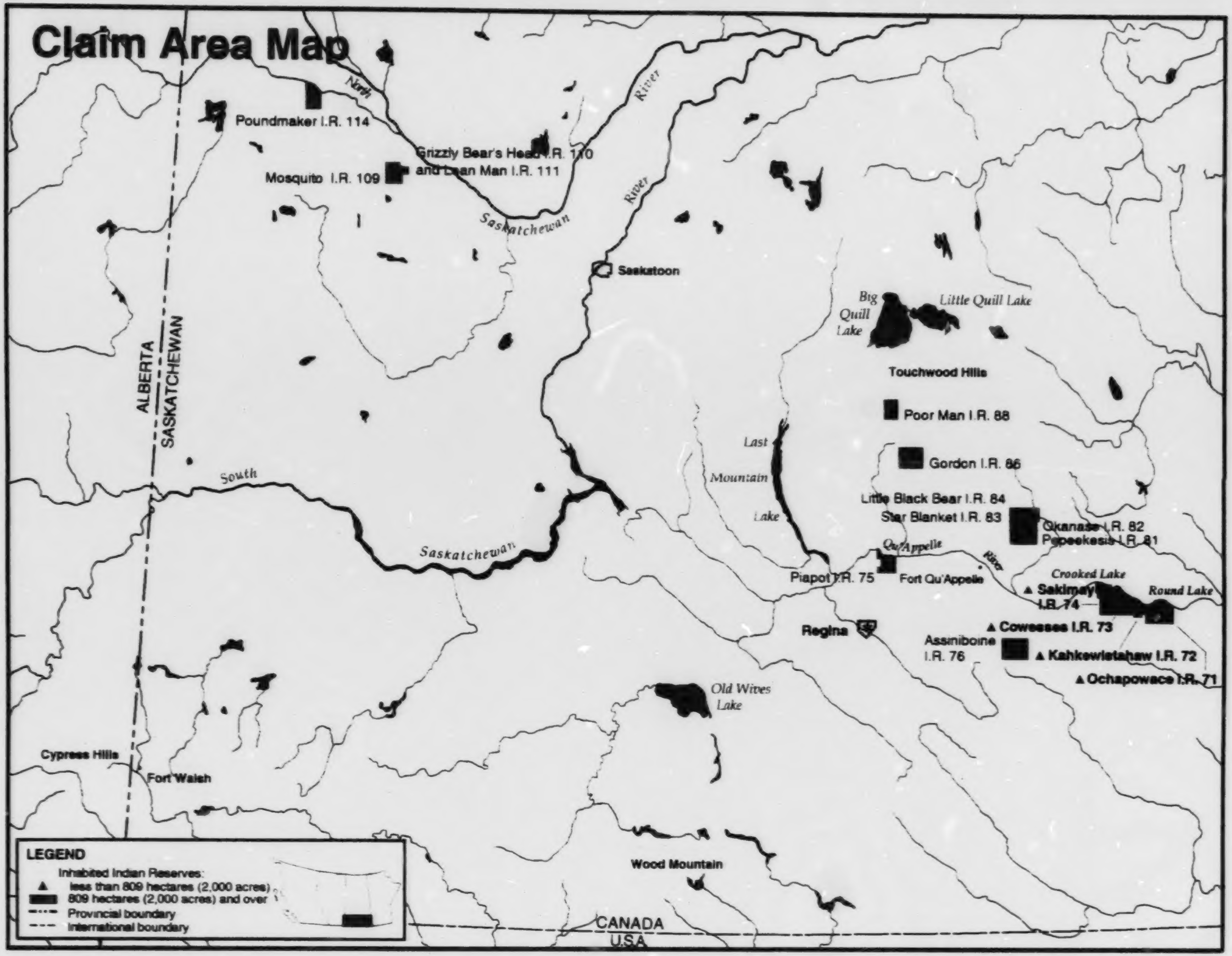
[10] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

[11] Department of Indian Affairs and Northern Development [hereinafter DIAND], *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in [1994] 1 ICCP 171-85 [hereinafter *Outstanding Business*].

Claim Area Map


Poundmaker I.R. 114
North
River
Grizzly Bear's Head I.R. 110
and Lean Man I.R. 111
Mosquito I.R. 109
Saskatchewan
River
Saskatoon
Big Quill Lake
Little Quill Lake
Touchwood Hills
Poor Man I.R. 88
Gordon I.R. 86
Little Black Bear I.R. 84
Star Blanket I.R. 83
Okanase I.R. 82
Pepeekesis I.R. 81
Last Mountain Lake
Qu'Appelle River
Piapot I.R. 75
Fort Qu'Appelle
Crooked Lake
Round Lake
▲ Sakimay I.R. 74
▲ Cowessess I.R. 73
Assiniboine I.R. 76
▲ Kahkewistahaw I.R. 72
▲ Ochapowace I.R. 71
Regina
ALBERTA
SASKATCHEWAN
South
Saskatchewan
Old Wives Lake
Cypress Hills
Fort Walsh
Wood Mountain
CANADA
U.S.A.
LEGEND
Inhabited Indian Reserves:
▲ less than 809 hectares (2,000 acres)
▬ 809 hectares (2,000 acres) and over
Provincial boundary
International boundary

PART II

THE INQUIRY

We begin with an examination of the historical evidence relevant to Kahkewistahaw's claim, including the documentary record and the testimony of the Crooked Lake elders during the community session conducted on May 3, 1995, on the Kahkewistahaw reserve. At that session, the Commission received evidence from seven members of the First Nation, including Mervin Bob, Joseph Crowe, Steven Wasacase, George Wasacase, Charles Buffalocalf Sr, Margaret Bear, and Ernest Bob. The Commission also heard from David Hoffman, a professional agrologist, appraiser, and land management consultant, who presented a report comparing the soil quality of the surrendered lands with that of the lands retained by the First Nation.[12]

The parties each submitted written arguments to the Commission on January 26, 1996, before making oral submissions at the final session in Saskatoon on February 1, 1996. The written submissions, documentary evidence, transcripts, and the balance of the record of this inquiry are referenced in Appendix A of this report.

HISTORICAL BACKGROUND

Canadian Indian Policy

The surrender of 33,281 acres of reserve land by the Kahkewistahaw Band in 1907 did not occur in an historical vacuum. Kahkewistahaw and Canada had already established a relationship through a treaty signed 33 years before the specific events of concern in this inquiry.

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[12] Hoffman & Associates Ltd, "Comparison of Soils between Surrendered and Non-Surrendered Areas of Kahkewistahaw," undated (ICC Documents, pp. 802-57).

Prior to the establishment of formal treaty relations between the Crown and Kahkewistahaw in 1874, Canada had already adopted clear Indian policies that were applied to the Indians of the West as they had been to their counterparts in eastern Canada, notwithstanding that special policies had been proposed to deal with the unique conditions on the prairies.[13] The immediate goal of the government was to place Indians under federal protection and influence in order to "civilize" them through education, Christian instruction, and agricultural training. The longer-term goal was to assimilate them into the general population once they no longer needed the shelter and guidance of the dominion government. This policy of the "Bible and the plough" was explicitly modelled on the approach taken in Upper and Lower Canada in the years before Confederation, and was based on the creation of federally protected reserves of sufficient size and adequate quality for economically viable agricultural production.[14]

As white settlement encroached on traditional Indian lands and buffalo became scarce, it became apparent that the traditional hunting way of life of the

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[13] Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 52-54, describes those policies as calling for the introduction of cattle before attempting to teach agricultural techniques; credit at stores where Indians could obtain necessities; larger reserves located farther from non-Indian settlements; greater annuities; preferential hiring policies for Indians in the police and military; a border patrol, among other things, to protect the remaining buffalo herds; and the creation of a special fund for Indian welfare from the sale of dominion lands. In hindsight, these policy proposals seem eminently sensible, especially in light of what actually transpired on the prairies.

[14] See John L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy," and John S. Milloy, "The Early Indian Acts: Developmental Strategy and Constitutional Change," in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 127, 145, and 323. See also John Leslie and Ron Maguire, eds., *The Historical Development of the Indian Act*, 2d ed. (Ottawa: DIAND, Treaties and Historical Research Branch, 1978).

Plains Indians could not long survive. Treaties initiated by Canada and consummated with the Plains Indians required the Indians to cede their aboriginal rights over huge tracts of land in exchange for, among other things, promises of reserve lands, agricultural implements, and farming instruction. The goal of these treaty promises by Canada was to provide Indians with an alternative economic base and to situate them in areas where they might sell their agricultural produce to nearby non-Indian communities. At the same time, it was decided that, until the Indians had become more sophisticated in matters of commerce, they should be protected by implementing safeguards for the disposal of their reserve lands.

To this end, the *Indian Act* was introduced to continue statutorily the policy of the *Royal Proclamation* of 1763 that no Indian reserve land could be sold or leased to third parties until it had first been surrendered by the band to the federal Crown. Treaty Commissioner Alexander Morris (who was also the Lieutenant Governor of Manitoba, the North-West Territories, and Keewatin) reflected this view as follows:

> I regard the system as of great value. It at once secures to the Indian tribes tracts of land, which cannot be interfered with, by the rush of immigration, and affords the means of inducing them to establish homes and learn the arts of agriculture. I regard the Canadian system of allotting reserves to one or more bands together, in the localities in which they have had the habit of living, as far preferable to the American system of placing whole tribes, in large reserves, which eventually become the object of cupidity to the whites, and the breaking up of which, has so often led to Indian wars and great discontent even if warfare did not result. The Indians have a strong attachment to the localities in which they and their fathers have been accustomed to dwell, and it is desirable to cultivate this home feeling of attachment to the soil. . . . Besides, the fact of the reserves being scattered throughout the territories, will enable the Indians to obtain

> markets among the white settlers, for any surplus produce they may eventually have to dispose of. . . . Any premature enfranchisement of the Indians, or power given to them to part with their lands, would inevitably lead to the speedy breaking up of the reserves and the return of the Indians to their wandering mode of life, and thereby to the re-creation of a difficulty which the assignment of reserves was calculated to obviate. There is no parallel between the condition of the North-Western Indians and that of the Indians who have so long been under the fostering care of the Government in the older Provinces of Ontario and Quebec.[15]

The notion of Crown protection of Indian reserve land, as referred to in the comments of Commissioner Morris, was not new: it had been a central feature of imperial and later colonial policy and had been explicitly adopted by the new dominion government.[16] Thus, at Confederation, the Secretary of State of the new Dominion of Canada became the Superintendent General of Indian Affairs and almost immediately took legal and administrative control of Indian lands through Canada's first national Indian land legislation.[17] Additional legislation in 1868 reflected the civilization and assimilation policy mentioned above, the goal of which was to facilitate the enfranchisement of individual male Indians who from the degree of "civilization" they had attained were worthy of this privilege of being released from Indian status in exchange for full citizenship and voting rights. With enfranchisement, a portion of the reserve lands could be freed from government protection, and could eventually become fee simple land.[18] In 1868, a separate department responsible for Indian Affairs (the Department) was established, first as a branch under the Secretary of State and later under the Minister of the Interior before becoming a full-fledged department in its own right in 1880. Local Indian agents, vested with many of the new powers of the Superintendent General, were appointed to ensure the uniform and effective application of Canadian Indian policy.[19]

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[15] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, including the Negotiations on which They Were Based* (Toronto: Belfords, Clarke and Co., 1880; facsimile reprint, Saskatoon: Fifth House Publishers, 1991), 287-88.

[16] See the following legislation: *An Act for the Protection of the Lands of the Crown in This Province from Trespass and Injury*, RSUC 1792-1840 (1839, c. 15); *An Act for the Better Protection of the Lands and Property of the Indians of Lower Canada*, Province of Canada Statutes 1850, c. 42; *An Act for the Protection of the Indians in Upper Canada from Imposition, and the Property Occupied or Enjoyed by Them from Trespass and Injury*, Province of Canada Statutes 1850, c. 74; *An Act respecting the Management of Indian Lands and Property*, SC 1860, c. 151.

[17] *An Act Providing for the Organization of the Department of the Secretary of State of Canada and for the Management of Indian and Ordnance Lands*, SC 1868, c. 42.

Treaty 4 (1874)

The historical context for the signing of Treaty 4 has been dealt with by the Commission in its March 1996 report into the treaty land entitlement claim of the Kawacatoose First Nation and in the more recent report into Kahkewistahaw's treaty land entitlement claim.[20] The context for the negotiations and excerpts from the actual discussions are set out as follows in the Kawacatoose report:

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[18] *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act 31st Victoria, chapter 42*, SC 1869, c. 6, ss. 13-16.

[19] SC 1880, c. 28, ss. 4-9.

[20] See Indian Claims Commission, *Kawacatoose First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996), now reported at (1996) 5 ICCP 73; Indian Claims Commission, *Kahkewistahaw First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, November 1996).

The early 1870s represent a period of great transition among the Indian nations that resided within the 75,000 square mile area of Treaty 4. The disappearance of the buffalo had been foreseen, white settlers were moving into the area, and some bands were taking steps to convert from the life of "plains buffalo hunters to reserve agriculturalists." Other bands were becoming more nomadic, moving freely back and forth across the U.S. border in pursuit of buffalo – a staple of the aboriginal diet and way of life. However, the increasing scarcity of buffalo led to periods of hardship and starvation, as well as greater competition and, ultimately, intertribal warfare over the remaining animals. As noted in the report prepared for this inquiry by the OTC [Office of the Treaty Commissioner]:

> Conflict between Assiniboine, Blackfoot, Gros Ventre, Crow and Sioux was common in the nineteenth century as well as conflict between Indians and non-Indians. The white settlers were not sympathetic to the plight of the Indians and often ignored their rights. The Indian practice of horse stealing, which was common between tribes, angered whites. The illicit whisky trade in which traders sold whisky to the Indians in exchange for buffalo robes or other commodities further exacerbated the violence. The Cypress Hills massacre was an example of the type of violence that occurred in this period.

Moreover, the survey operations of the Boundary Commission and the steps associated with erecting a proposed telegraph line west of Fort Garry were starting to affect this territory, "all which proceedings are calculated to further unsettle and excite the Indian mind, already in a disturbed condition. . . ."

Alexander Morris was Lieutenant Governor of the area which then comprised Manitoba and the North-West Territories, including present-day Saskatchewan. Together with David Laird, the federal Minister of the Interior, and W.J. Christie, a retired factor with the Hudson's Bay Company, Morris was commissioned by the Government of Canada to make treaties with Indian nations in the southern "Fertile Belt."

At Lake Qu'Appelle in September 1874, the three Commissioners negotiated with the assembled Chiefs for six days to encourage the initially reluctant Indian leaders to accept the benefits of treaty in exchange for ceding Indian rights in the lands encompassed by Treaty 4. Morris reported the concerns expressed by the Chiefs at these meetings, particularly over what was perceived by the Indians to be the unfairly advantageous position of the Hudson's Bay Company at that time, but also over the rights of present and future generations of the aboriginal peoples. On September 11, 1874, the third day of the conference, Morris gave the Chiefs the following assurances:

> The Queen cares for you and for your children, and she cares for the children that are yet to be born. She would like to take you by the hand and do as I did for her at the Lake of the Woods last year. We promised them and we are ready to promise now to give five dollars to every man, woman and child, as long as the sun shines and water flows. We are ready to promise to give $1,000 every year, for twenty years, to buy powder and shot and twine, by the end of which time I hope you will have your little farms. If you will settle down we would lay off land for you, a square mile for every family of five. . . .

The next day Morris stated:

> [. . . The Queen thinks of the children yet unborn. I know there are some red men as well as white men who only think of to-day and never of to-morrow.] The Queen has to think of what will come long after to-day. Therefore, the promises we have to make to you are not for to-day only but for to-morrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the oceans. When you are ready to plant seed the Queen's men will lay off Reserves so as to give a square mile to every family of five persons . . . [, and on commencing to farm the Queen will give to every

> family cultivating the soil two hoes, one spade, one scythe for cutting the grain, one axe and plough, enough seed wheat, barley, oats and potatoes to plant the land they get ready. The Queen wishes her red children to learn the cunning of the white man and when they are ready for it she will send schoolmasters on every Reserve and pay them. We have come through the country for many days and we have seen hills and but little wood and in many places little water, and it may be a long time before there are many white men settled upon this land, and you will have the right of hunting and fishing just as you have until now until the land is actually taken up. . . . I think I have told you all that the Queen is willing to do for you.][21]

On September 15, 1874, the final day of the conferences, Morris convinced Chief Kahkewistahaw, or "He Who Flies Around," and twelve other chiefs and headmen of Cree and Saulteaux bands in the area to sign Treaty 4.

The "reserve clause" in Treaty 4 set forth Canada's obligation to provide reserve land to Indian bands:

> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families. . . .[22]

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[21] See Indian Claims Commission, *Kawacatoose First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996), 5 ICCP 73 at 96-99. Footnote references omitted.

[22] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 6 (ICC Documents,

With respect to the alienability of reserve land, Treaty 4 continued:

> . . . provided, however, that it be understood that, if at the time of the selection of any reserves, as aforesaid, there are any settlers within the bounds of the lands reserved for any band, Her Majesty retains the right to deal with such settlers as She shall deem just, so as not to diminish the extent of land allotted to the Indians; and provided, further, that the aforesaid reserves of land, or any part thereof, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained, but in no wise shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.[23]

Treaty 4 also provided that members of signatory bands would be entitled to receive cash annuities, material aid in the form of farm implements and livestock, and agricultural instruction, among other things. As the Commission noted in the Kawacatoose report, "[t]he farm implements and livestock, together with a band's allocation of reserve land, were important to enable the band to develop a new economy based on agriculture."[24]

That the Indians in this area of Saskatchewan were serious about farming is shown clearly by the fact that, one year following the signing, some of the bands from the Qu'Appelle area sent a message to Lieutenant Governor Morris in

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p. 2).

[23] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 6 (ICC Documents, p. 2).

[24] Indian Claims Commission, *Kawacatoose First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996), 5 ICCP 73 at 100.

Winnipeg requesting the agricultural implements promised in the treaty.[25] For several years thereafter, usually at the time of the annual treaty annuity payments, the Treaty 4 bands continued their original demands, even to the point of collectively voicing their concerns to the Governor General, the Marquis of Lorne, on the occasion of his 1881 visit to the North-West Territories. At that time they complained about the hardship they were experiencing as a result of hunger and privation, assured him of their commitment to farming, and implored him to arrange for more work oxen, tools, and equipment to be provided to them under their treaty.[26]

Twenty-six years after signing Treaty 4 at Lake Qu'Appelle, Chief Kahkewistahaw would have occasion, when approached by Indian Commissioner David Laird in 1902 about the possibility of the Band surrendering part of its reserve, to remind the Crown of its treaty promises. Kahkewistahaw admonished Commissioner Laird, "We were told to take this land and we are going to keep it."[27]

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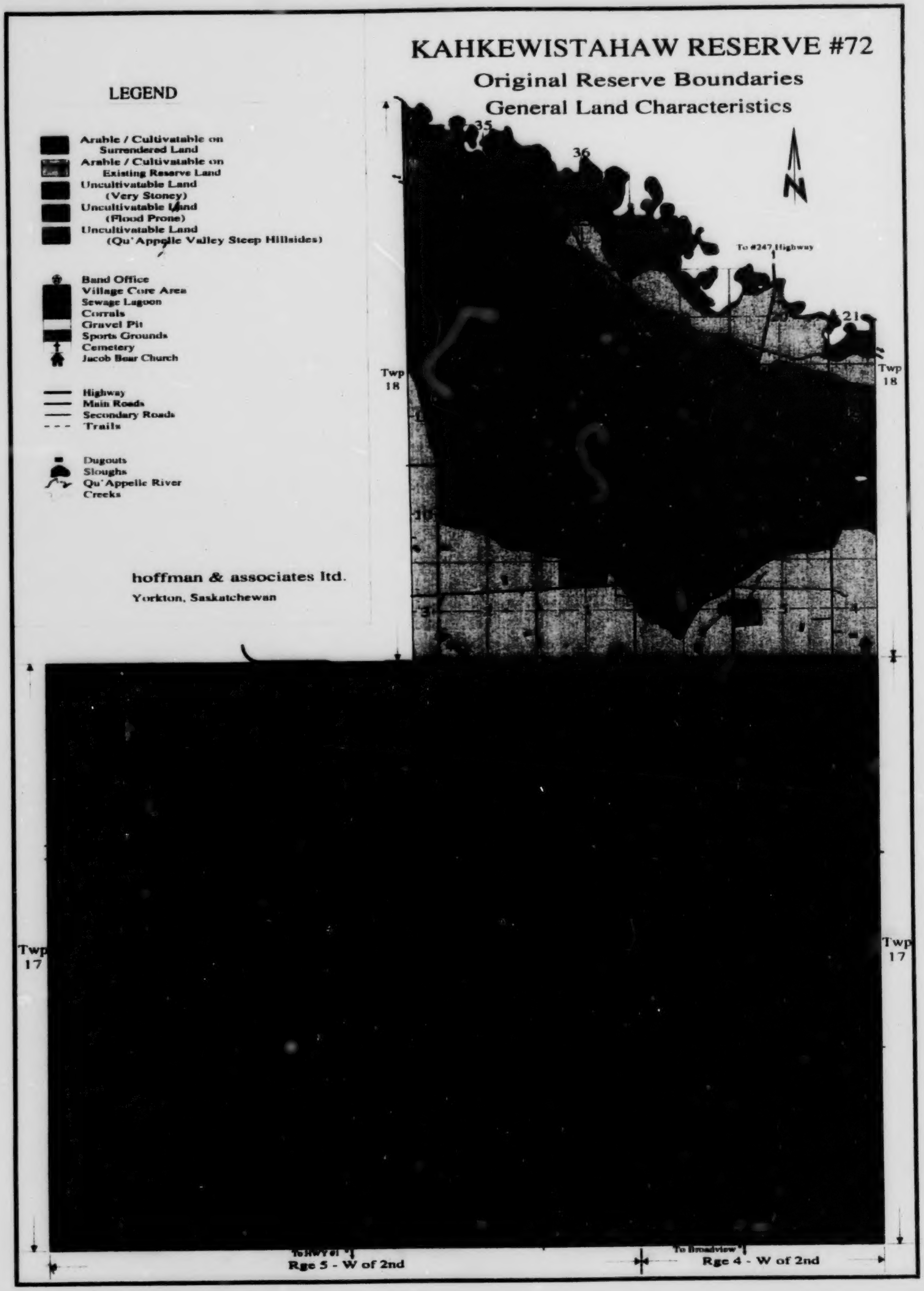
[25] Telegram of July 10, 1875, from Lieutenant Governor Alexander Morris to Superintendent General David Laird, and reply of July 12, 1875, from Laird to Morris, NA RG 10, vol. 3622, file 5007. The story of Canada's response to these early requests for assistance is told by Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 63-65.

[26] Address of the Qu'Appelle Chiefs to the Governor General, NA, RG 10, vol. 3768, file 33,642.

[27] David Laird, Indian Commissioner, to J.D. McLean, Secretary, Department of Indian Affairs, May 6, 1902, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 175-77).

KAHKEWISTAHAW RESERVE #72

Original Reserve Boundaries
General Land Characteristics


LEGEND
Arable / Cultivatable on Surrendered Land
Arable / Cultivatable on Existing Reserve Land
Uncultivatable Land (Very Stoney)
Uncultivatable Land (Flood Prone)
Uncultivatable Land (Qu'Appelle Valley Steep Hillsides)
Band Office
Village Core Area
Sewage Lagoon
Corrals
Gravel Pit
Sports Grounds
Cemetery
Jacob Bear Church
Highway
Main Roads
Secondary Roads
Trails
Dugouts
Sloughs
Qu'Appelle River
Creeks
N
35
36
To #247 Highway
20
21
Twp 18
Twp 18
Twp 17
Twp 17
To Hwy 9
To Broadview
Rge 5 - W of 2nd
Rge 4 - W of 2nd

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Yorkton, Saskatchewan

The Kahkewistahaw Reserve

At the time of signing Treaty 4, the nomadic existence of the Kahkewistahaw Band was centred in southwestern Saskatchewan near the Cypress Hills. The Band's members apparently had no experience whatsoever with agriculture. Made up primarily of Plains Cree with some Saulteaux members, the Band depended more on the buffalo than did the other bands that settled on reserves at Crooked Lake.

Chief Kahkewistahaw was from a prominent and well-respected family. His father, Le Sonnant, had signed the Selkirk Treaty of 1817 in Manitoba, and his brother, The Fox, was a well-known Cree leader in his own right.[28] As the years passed, the esteem with which Chief Kahkewistahaw's own people regarded him was repeatedly demonstrated, and Department officials also viewed him as being of particularly sound judgment. Kahkewistahaw healed the early divisions in the Band over the government's reserve policy and persuaded his people to stay out of the 1885 Riel Rebellion, even to the point of leaving the reserve to retrieve a number of young warriors who had joined rebellious Chiefs. In recognition of his leadership role, Kahkewistahaw was invited to Ottawa after the conclusion of hostilities and was well received there.[29]

Between 1874 and 1880, the Kahkewistahaw Band returned to the Qu'Appelle Valley each year to receive treaty annuity payments. William Wagner surveyed an area of 41,414 acres for Kahkewistahaw in 1876, but the evidence shows that the

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[28] The Kahkewistahaw Band is described in Sarah Carter, *Lost Harvests*: *Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 47.

[29] The story of Kahkewistahaw's role in the Riel Rebellion is related in Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, pp. 17-20 (ICC Exhibit 18).

Band never lived on or used this land, and thus never accepted it as a reserve. Instead, Kahkewistahaw and his people chose to pursue what was left of their traditional buffalo hunting economy in the Cypress Hills.

Subsequently, Allan Poyntz Patrick and his assistant, William Johnson, were commissioned in 1880 to survey the reserves of those bands desiring them, and Kahkewistahaw was one such band. In our recent report dealing with Kahkewistahaw's treaty land entitlement claim, we concluded that Patrick and Johnson started, but likely did not complete, the survey of Kahkewistahaw's reserve in 1880. The following year, in 1881, John C. Nelson surveyed Kahkewistahaw Indian Reserve (IR) 72 and provided the Band with a fishing station, which was later replaced with the 96-acre IR 72A in 1884. These two reserves were eventually confirmed by Order in Council on May 17, 1889. In total, Kahkewistahaw received 46,816 acres of land, sufficient for 365 people under the Treaty 4 formula of 128 acres per person. In the ensuing years, reports by the Indian agents confirmed the overall quality of the Band's lands, noting in particular the timber stands in the gulches and the relatively high calibre of the hay fields on the southern portion of the reserve which was later surrendered.[30]

Farming on the Kahkewistahaw Reserve

Following the survey of IR 72 in 1881, Kahkewistahaw's economy slowly evolved from almost complete dependence on government rations and assistance to a relatively self-sustaining mixed farming operation. This evolution occurred notwithstanding several hurdles – some natural, others man-made – that obstructed the Band.

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[30] For instance, in the 1899 *Annual Report* the agent described the Kahkewistahaw reserve as "undulating prairie of fair quality interspersed with ponds and hay sloughs, dotted here and there with bluffs of poplar. There are some very good hay lands on the prairie in the southern part": Canada, Parliament, *Sessional Papers*, 1899, no. 14, p. 140.

Hayter Reed, in his role as Indian Commissioner and then as Deputy Superintendent General, was one of the primary architects and administrators of prairie Indian policy during the period under review in this report.[31] Reed's farm policies are of particular interest in this inquiry.

Although not as well known for farming as their neighbours on the Cowessess reserve, members of the Kahkewistahaw Band were generally willing to embrace agriculture as the means by which they would make the necessary adjustment to the new conditions of life confronting them. Thus, when faced in 1883 with the pending closure of the Department's home farm instruction program that had begun only a few years before, Band members specifically asked the visiting Inspector of Indian Agencies for a teacher for their children as well as a resident farm instructor who would be designated solely for their instruction.[32] As a result of this and similar requests from other bands across the prairies, the farm instruction program was renewed in 1885 and more and better equipment was supplied by the Department.

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[31] Reed began his career as an Indian agent in the Battleford area in 1881, rising to Assistant Commissioner in 1884 and to Indian Commissioner in 1888. He later replaced Lawrence Vankoughnet as Deputy Superintendent General in 1893. The office of Indian Commissioner is succinctly described in Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 11: "The Commissioner of Indian Affairs was the principal official of the Indian Branch (later, the Department of Indian Affairs) on the Prairies. Under his guidance the provisions of the treaties were administered. He organized the surveying of reserves and the settlement of Indians on them. A complex bureaucracy of Indian agents and agency inspectors was created to carry out his instructions in the far-flung corners of his domains. The Commissioner, in turn, reported to headquarters of the Indian branch in Ottawa."

[32] Report to the Superintendent General of Indian Affairs, July 6, 1883, in Canada, Parliament, *Sessional Papers,* no. 4, *Annual Report of the Department of Indians Affairs*, 1883, 117-18.

Eventually, a farming instructor was assigned to the four reserves making up the Crooked Lake Agency – Kahkewistahaw, Cowessess, Ochapawace, and Sakimay.

Although it appears from the early reports that some of Kahkewistahaw's members were slow to abandon their buffalo-hunting traditions and to embrace farming, later reports indicate that, in relatively short order, farming became the main economic activity at Kahkewistahaw, as on the other Crooked Lake reserves.[33] Departmental statistics indicate that, as early as 1884, for instance, 12 of the 49 families on the Kahkewistahaw reserve were farming a total of 55 acres.[34] Nor were Band members lacking ambition when it came to learning how to farm. Indian Agent Alan McDonald reported in 1889, for example – after almost the entire wheat crop had been destroyed by drought – that Band members, although discouraged, were not ready to give up and were already turning the soil over in anticipation of a better season the following year.[35] In 1901 Indian Agent Magnus Begg made similar comments, reporting that Kahkewistahaw's members were neither lazy nor unwilling to learn and apply agricultural techniques.[36]

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[33] See, for example, the agricultural acreage graphs compiled by Sarah Carter in "Two Acres and a Cow: 'Peasant' Farming for the Indians of the Northwest, 1889-1897," in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 371-72.

[34] This acreage compares favourably with the Cowessess Reserve, where 16 out of 70 families farmed a total of 86 acres, and with Ochapawace, where 18 out of 69 families farmed 74 acres of reserve land: Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), Appendix 2; Canada, Parliament, *Sessional Papers*, 1884, vol. 18, no. 3, *Annual Report of the Department of Indian Affairs*, 1884, 192-205.

[35] Report from Alan McDonald to Indian Commissioner, July 27, 1889, NA, RG 10, vol. 3761, file 32,182.

[36] Report from Magnus Begg to Superintendent General, July 31, 1901, in Department of Indian Affairs, *Annual Report*, 1901, 141-45.

Despite the effort Kahkewistahaw's people may have brought to this new enterprise, farming on the prairies was a difficult undertaking. This was as true for the settlers as it was for the apprentice Indian farmers. Unlike the lands in eastern Canada, those in the West were extremely dry and, because of the harsh climate, the growing season was relatively short. In addition, as Sarah Carter describes, there were other problems that were unique to the fledgling Indian farmers:

> Some of these problems were those experienced by all early settlers - drought, frost, hail, and prairie fire, an absence of markets, and uncertainties about what to sow, when to sow, and how to sow. There were other problems that were not unique to the Indians but were likely magnified in their case. For example, reserve land often proved to be unsuitable for agriculture. Indian farmers also had limited numbers of oxen, implements, and seed: the treaty provisions for these items were immediately found to be inadequate. Indians were greatly hampered in their work because they lacked apparel, particularly footwear. They were undernourished, resulting in poor physical stamina and vulnerability to infectious diseases.[37]

Until the introduction of Marquis Wheat, with its shorter maturation period, in 1911, the longer growing season required by Red River Settlement Wheat and Red Fife Wheat meant that wheat crops were susceptible to the severe and unpredictable weather conditions. Drought, frost, and hail, for instance, damaged crops at the Crooked Lake Agency regularly throughout the 1880s and 1890s and into the 20th century. So difficult were the conditions that many farmers, including non-Indians, gave up during this time and abandoned farming completely.[38]

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[37] Sarah Carter, "Two Acres and a Cow: 'Peasant' Farming for the Indians of the Northwest, 1889-1897," in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 354.

Despite the recurrent problems, wheat became and remained Kahkewistahaw's staple crop throughout the period leading up to the surrender in 1907, accounting for half the recorded acreage under cultivation on the reserve. From 12 acres of wheat in 1882, the cultivated area grew to 90 acres by 1887 and to 100 acres in 1891, remaining at nearly that level until 1895. Exceptionally, in 1892, more than 150 acres of wheat were seeded, while in 1899 the figure was approximately 115 acres.[39] Other crops were also planted, including oats, barley, and rye, as well as garden vegetables such as potatoes and turnips.[40] Although their farms were usually small, "[t]he great majority of the men on the Kahkewistahaw Reserve engaged in some form of farming; in the typical year between 1886 and 1895, two-thirds of the adult males had a farm of some sort, and this was a significantly greater proportion than on the more successful Cowessess Reserve."[41] For reasons that will be set out below, the acreage under cultivation on the

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[38] On the basis of his review of departmental *Annual Reports* and *Sessional Papers*, Ken Tyler concluded that "on the Crooked Lakes Agency, crops were damaged by drought in 1886, 1887, 1889, 1891, 1894, 1897, 1898, and 1900. In 1884, 1890, 1891, 1895, 1898, 1899, and 1904, they suffered from frost. And in 1888 and 1900, there was damage due to hail": Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, p. 30 (ICC Exhibit 18).

[39] Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, pp. 33-34 (ICC Exhibit 18).

[40] Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, p. 34 (ICC Exhibit 18).

[41] Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, p. 34 (ICC Exhibit 18).

Kahkewistahaw reserve, as on others, began to decline in the late 1890s and never recovered to former levels.

It must be recalled that, because of the effects of disease (primarily tuberculosis), band populations in the West at that time were in decline. Between 1883 and 1886, the Kahkewistahaw population fell from 274 to 183 (and continued to fall thereafter, albeit less dramatically), something departmental officials attributed primarily to disease.[42] In 1886, Kahkewistahaw had 20 men farming, and in 1895 there were 23.[43] By 1906, however, Indian Agent Matthew Millar reported that only five members of the Band could be called grain farmers. By the same token, however, he also observed that other members kept cattle and that "[m]ost of these Indians put up a good supply of hay."[44]

These were not the only obstacles facing prairie Indian farmers. At the beginning of the home farm instruction program in the late 1870s, the farm instructors themselves, recruited primarily from eastern Canada, were largely ignorant of the conditions on the prairies.[45] Local settlers also opposed the instruction program because they thought it gave Indian farmers false expectations and an unfair commercial advantage over their non-Indian competitors. For instance, in his annual report in 1888, Indian Commissioner Reed noted that "serious complaint has been made by some settlers of the effect of this competition upon them."[46] At that time, prairie newspapers often carried stories condemning the government for unfairly assisting Indians to the detriment of white farmers.[47] This was particularly unwelcome publicity in the years immediately after the Riel Rebellion and at a time when the government was attempting to attract more settlers to populate the prairies.

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[42] Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, p. 26 (ICC Exhibit 18). With respect to the ravages of disease, see Sarah Carter, "Two Acres and a Cow: 'Peasant' farming for the Indians of the Northwest, 1889-1897," in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 354.

[43] Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, p. 34 (ICC Exhibit 18).

[44] Report of June 30, 1906, from Indian Agent M. Millar to Superintendent General, in Department of Indian Affairs, *Annual Report*, 1906, 125-26.

[45] Inspector Wadsworth to Superintendent General, December 9, 1882, in Canada, Parliament, *Sessional Papers*, 1882, vol. 16, no. 5, Department of Indian Affairs, *Annual Report*, 1882, 190.

In light of the actual conditions, the perception that Indian farmers were in competition with the settlers hardly seems sustainable. At the outset, the Indians were not only unskilled, but received instruction and implements that were often substandard. The Canadian-manufactured ploughs provided in the late 1870s and early 1880s, for example, were clearly inferior to models produced in the United States and they tended to break easily in the tough prairie soil. Nonetheless, the Department refused to request tenders on superior American-made ploughs until after 1882.[48] Similarly, the oxen provided for ploughing and related purposes were often unsuitable, being either freight animals that had never been used for ploughing or completely unbroken animals. The Department simply did not provide enough farming equipment or animals for practical farming operations. Commissioner Edgar Dewdney admitted as much in 1884, noting that "the want of more teams and implements is found from one end of the territory to another" and that the Treaty 4 area was particularly deficient in this respect.[49]

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[46] Reed to Superintendent General, October 31, 1888, in Canada, Parliament, *Sessional Papers,* 1888, vol. 22, no. 16, Department of Indian Affairs, *Annual Report,* 1888, 127.

[47] See the examples given by Sarah Carter in *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 187-88.

[48] Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 95.

Although many of these problems were reduced or overcome through improvements in the farm instruction program and advances in farming techniques, there were others that required considerable local effort and ingenuity. For example, a major hindrance to Kahkewistahaw's success was the absence of a natural market for wheat and other farm produce of the Crooked Lake Agency – something Reed readily admitted.[50] Crooked Lake farmers had, in addition, the problem of getting their wheat ground into flour, so any wheat harvested was almost useless to them for food or commercial purposes until they could get it ground. At the beginning of Kahkewistahaw's farming efforts in the 1880s, all grain had to be shipped to a mill 80 miles away. Owing to the efforts of Indian Agent McDonald, a grist mill was finally constructed in 1891 and located on the Cowessess reserve. Department funds were used to buy the equipment and materials required, with Indian labour accounting for a considerable portion of the actual construction. Grinding began in 1892 and, within a short period of time, the Crooked Lake Bands were able not only to cut their own grinding costs in half but to offer milling services to nearby non-Indian farmers.[51]

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[49] Dewdney to Superintendent General, January 1, 1882, in Department of Indian Affairs, *Annual Report*, 1881, 41.

[50] Hayter Reed to Superintendent General, February 27, 1884, NA, RG 10, vol. 3666, file 10,181.

[51] Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, p. 37 (ICC Exhibit 18).

Beginning in the late 1880s, the farmers on the Kahkewistahaw reserve were sufficiently confident in their enterprise that they began purchasing equipment out of the proceeds of their own grain sales. In 1888, the Band bought a binder. Over the years, the Crooked Lake Bands purchased additional equipment of all sorts from their own funds, assisted by McDonald, who had obtained a concession from the Massey-Ferguson farm equipment company and scrupulously applied the profits exclusively for the benefit of the agency's farming operations. Between 1889 and 1896, the Kahkewistahaw Band alone bought a binder, four mowers, three rakes, and seven wagons, as well as smaller equipment and tools.[52]

Raising livestock was another vocation that Kahkewistahaw's members undertook with enthusiasm shortly after the Band moved onto its Crooked Lake reserve. The oxen called for in Treaty 4 began arriving in the early 1880s, and soon both dairy and beef cattle herds became a prominent aspect of the Band's overall agricultural efforts. By 1896, the Band had a herd of 157 animals, more than half of them beef cattle and the rest either work oxen or dairy cows. Unlike grain, beef found a ready market in nearby Broadview, and the Department also purchased beef for rations. The Crooked Lake Bands made serious efforts at that time both to increase their production of beef cattle and to improve the stock. To this end, the agency acquired pedigreed bulls in 1890 and in 1893, and Kahkewistahaw obtained another bull for its own use in 1902.[53] Official reports from the time show that Band members were interested in cattle production and were motivated to keep their animals in good shape.[54]

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[52] The purchases of the Kahkewistahaw Band are described in Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, pp. 39, 40, and 43 (ICC Exhibit 18).

[53] Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, pp. 47-48 (ICC Exhibit 18).

Raising livestock required good hay lands, something that Kahkewistahaw had in abundance on the southern part of its reserve – the part surrendered in 1907. The sloughs at the south end of the reserve were not only sufficient for the Band's hay needs but yielded even in dry years an excess that could be sold on the Broadview market for a small profit. Such enterprise, however, prompted Indian Agent Begg to deny the Band a permit to sell its hay and wood, because he and other officials were determined to satisfy their own needs at prices they could set. The amount of hay cut by the Band rose steadily over the years – from 85 tons in 1882 to 350 tons by 1895 – providing a welcome source of income to Band members who still relied, to some extent at least, on rations and other forms of government assistance.[55]

The Changing Relationship between the Crown and the Band

To ensure that Indians were not without civilized guidance, Indian agents were appointed in every treaty area on the prairies. Their broad administrative and quasi-judicial powers made them figures of considerable local power and influence and highlighted the waning autonomy of First Nations under Canadian Indian policy. Helen Buckley describes the agency system as follows:

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[54] See Department of Indian Affairs, *Annual Report,* 1888, 67; 1889, 64; 1892, 158-59; 1898, 134-35; 1901, 142; 1902, 139; 1903, 158; 1905, 123; and 1907, 123.

[55] Fifteen per cent of the Band membership were regularly in receipt of rations in 1896, with others falling back on department support as the need arose. A few years later, the aged and sick were reported by agent Wright to be the only ones drawing regular rations. Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, pp. 49 and 57 (ICC Exhibit 18).

> A network of agents had charge at the local level, each responsible for one or more reserves, and they were powerful figures in their own right, given the primitive communications of the day. These were the men who saw the farm programs implemented, enforced school attendance, allocated housing, and dealt with domestic disputes and a great many other matters. They wrote full reports to Ottawa on both the progress and the problems of their charges. Some agents were dedicated men who did the best they could within the limits of the system; some were political appointees, poorly educated and unsuited for the job; a few were rogues, intent on profiting from their position.[56]

In their testimony before this Commission, elders from the Crooked Lake area recalled the power and influence of the Indian agents over a wide spectrum of band life well into the 20th century: ". . . the Indian agent was a policeman, sometimes a doctor, he was a guardian, and he was – he was everything."[57]

After the 1885 Riel Rebellion, the Department decided that stricter supervision needed to be exercised over prairie Indians, particularly the Cree of Saskatchewan. The territories for which individual agents were responsible were reduced in size – the two Indian agencies in Saskatchewan were increased to 10 – and an Indian agent was designated specifically to the Crooked Lake reserves, with his agency office located at Cowessess.[58] The first Crooked Lake Indian Agent was

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[56] Helen Buckley, *From Wooden Ploughs to Welfare: Why Indian Policy Failed in the Prairie Provinces* (Montreal and Kingston: McGill-Queen's University Press, 1992), 43. See also H.B. Hawthorn, C.S. Belshaw, and S.M. Jamieson, *The Indians of British Columbia: A Study of Contemporary Social Adjustment* (Toronto: University of Toronto Press, 1958), 486.

[57] ICC Transcript, May 3, 1995, p. 71 (Margaret Bear).

[58] Indian Commissioner E. Dewdney to Superintendent General, June 4 or July 17, 1885, NA, RG 10, vol. 3671, file 68970, pts. 1 and 2. The first agent designated for the entire Treaty 4 area had been W.J. Christie. He was succeeded in 1876 by Angus McKay,

Alan McDonald, a former soldier who had been present at the signing of Treaty 4 and who served as Indian agent until his retirement from the Department. He was succeeded in 1896 by J.P. Wright, who served a few years until being replaced by Magnus Begg. Begg's death in 1904 led to the appointment of Matthew Millar, who was the Indian agent at the time of the 1907 surrender at issue in this inquiry.

Departmental regulations required Indians in the Prairie Provinces to obtain permits from the Indian Agent to sell their own agricultural produce,[59] an authority sometimes exploited by the agents for reasons unconnected to the official rationale of protecting unsophisticated Indians from unscrupulous buyers. For instance, in 1903, Begg refused to give a permit to the neighbouring Cowessess Band; in so doing, he forced its members to sell hay and timber to agency officials at relatively low prices, rather than selling on the open market where better prices could have been obtained.[60]

Since the Crooked Lake Bands were still dependent on rations and other forms of assistance from Canada for their survival, rations soon became another means of enforcing compliance with departmental wishes. As Deputy Superintendent General Hayter Reed observed: "To compel obedience when moral suasion failed, the only means of coercion was to stop their rations. . . ."[61] There was much suffering from hunger and exposure during the early period, and protests

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who was himself followed by McDonald in 1877.

[59] SC 1881, c. 17, ss. 1, 2.

[60] Magnus Begg to Deputy Superintendent General, July 14, 1903; Deputy Superintendent General to Indian Agent Magnus Begg, July 23, 1903. Both documents are in NA, RG 10, vol. 8052, file 673/20-7-2-73.

[61] McGill University, McCord Museum, Hayter Reed Papers, "Address on the Aims of the Government in Its Dealings with the Indians," nd, p. 25.

over rations erupted at Cowessess, Sakimay, and Kahkewistahaw. A departmental inspection of the Crooked Lake reserves in 1886 confirmed the problems, noting that "[a]t that time one could scarcely stir without being besieged by Indians asking for help in the way of food."[62] According to the elders, the Crooked Lake Bands were never free of the need for rations.[63]

Similarly, the prairie pass system was implemented to control the movement of prairie Indians and to prevent them from leaving their reserves without permission. It was also used to discourage parents from visiting their children in off-reserve residential schools and to prevent attendance at traditional ceremonies or dances off the reserves.[64] The recollections of the elders confirm this control,[65] as do the reports of agents like McDonald, who noted in 1894 that "[t]he practice of visiting other reserves I have firmly repressed. . . ."[66]

Under a departmental cattle loan program, Indian farmers could borrow a cow or an ox on condition that the animal or its offspring be returned to the Department. Although the farmer could retain either the borrowed animal or its offspring, he could neither sell nor slaughter it without official permission. Moreover, although many Indian farmers also owned cattle privately outside the cattle loan program, the agents also insisted on controlling the Indians' privately owned cattle by having the animals marked with the departmental brand and by levying fines on anyone who sold or slaughtered his own animals without official permission.[67]

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[62] Alexander McKibbon, "Report to the Superintendent-General of Indian Affairs," in Canada, Parliament, *Sessional Papers*, 1897, no. 14, *Annual Report of the Department of Indian Affairs*, 1897, 214.

[63] ICC Transcript, May 3, 1995, pp. 18-19 (Mervin Bob).

[64] See F.L. Barron, "The Indian Pass System in the Canadian West, 1882-1935," *Prairie Forum* (spring 1988): 21; J.R. Miller, "Owen Glendower, Hotspur, and Canadian Indian Policy," in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto University Press, 1991), 325-27.

[65] ICC Transcript, May 3, 1995, p. 98 (Margaret Bear), and p. 100 (Mervin Bob).

[66] McDonald to Superintendent General, July 31, 1893, in *Annual Report of the Department of Indian Affairs*, 1893, 63; McDonald to Superintendent General, July 20, 1894, in *Annual Report of the Department of Indian Affairs*, 1894, 65.

Contemporary observers were often shocked at the restrictions and coercive measures applied by the agents to prairie Indians:

> He cannot go visit a friend on a neighbouring reserve without a permit. He cannot go to the nearest market town unless provided with a permit. In what was his own country and on his own land he cannot travel in peace. He cannot buy and sell without a permit. He may raise cattle but he cannot sell them unless the government official allows. He may cultivate the soil but he is not the owner of his own produce. He cannot sell firewood or hay from the land that is his by Divine and citizen right, and thus reap the result of his own industry unless subject to the caprice or whim of one who often becomes an autocrat. Said an Indian to me a few days since "I raise cattle, they are not mine, my wood I cannot sell – my own hay I cannot do what I would with – I cannot even do as I like with the fish I may catch. How can I become a man?"[68]

Despite these difficulties, Indian farmers made slow but steady progress until the introduction of two new policies – severalty and peasant farming – beginning in 1889. These policies, when coupled with strict supervision by the Indian agents, contributed significantly to the decline in farming activity among Indian farmers on the Crooked Lake reserves.

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[67] Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 169-70.

[68] John McDougall, "The Future of the Indians," nd, pp. 6-7, Glenbow-Alberta Institute, McDougall Family Papers, file 11.

Indian Commissioner Edgar Dewdney noted that the severalty policy of subdividing reserves into small plots of land to be allocated to individual Indians "has been recognized as the only true one for the development of a sense of individual responsibility, as opposed to the system of communism among the Indians. . . ."[69] Hayter Reed agreed and, on his appointment as Indian Commissioner, he moved to implement the subdivision of reserves. In his 1888 Annual Report he announced that severalty would hasten individualism among Indians, break down the tribal system, and ultimately make Indian farmers self-sufficient and free of the need for government assistance.[70]

Under the severalty policy, reserves were to be surveyed and subdivided into 40-acre plots for distribution to individual band members, on the rationale that this would allow the best lands to be divided more equitably. By the same token, however, it also led to large tracts of "unused" reserve lands that could then be sold, a goal which local settlers and newspapers endorsed[71] and which Reed envisaged as the logical outcome of the policy.[72] The Crooked Lake reserves were among the earliest to be subdivided, with Kahkewistahaw going first, followed by Cowessess and Sakimay. Ochapawace refused. However, not all reserves in the Treaty 4 area were subject to the severalty policy, nor did Indian farmers necessarily get the best land on those reserves that were subdivided:

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[69] Dewdney to Deputy Superintendent General Vankoughnet, February 9, 1887, NA, RG 10, vol. 3774, file 37,060.

[70] Reed to Superintendent General, October 31, 1888, in Department of Indian Affairs, *Annual Report*, 1887, 128.

[71] See Sarah Carter, "Two Acres and Cow: 'Peasant' Farming for the Indians of the Northwest, 1889-1897," in J.R. Miller, ed., *Sweet Promises*: *A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 356-57, for a review of the favourable political and public opinion.

[72] In response to objections from the Inspector of Surveys in the Department of the Interior, Reed asserted that the subdivision according to the Dominion Lands Survey was

> In the Treaty Four District, subdivision proceeded only on those reserves that were close to the railway and were attractive for agricultural purposes. The forty acre lots were located on the northern half of these reserves, near the river, on land that was cut by deep ravines in places and was regarded by few as the best for agriculture. . . . In most places, the southern portion that remained undivided had the superior farmland and hay grounds.[73]

The related peasant farming policy reflected the notion that an Indian farming family should possess only the amount of land it could cultivate using the most primitive of hand tools, most of which were to be manufactured by the family itself. The official goal was to free Indians from "communistic" tribal culture by converting them into European peasant-style subsistence farmers. The thinking was that an Indian farming family ought to need no more than an acre or less of wheat, another acre or so of root crops and vegetables, and a couple of cows. Instead of groups of farmers working cooperatively to purchase, share, and maintain farming machinery to be used in common fields, individual peasant farmers would plant and harvest smaller subsistence crops using simple implements. Their wives and

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being done in anticipation "of the time when, as is now being done with the Pass-pass-chase Reserve [which was surrendered under questionable circumstances], some lands will be disposed of, or exchanged": Reed to Deputy Superintendent General, July 30, 1891, NA, RG 10, vol. 3811, file 55,152-1.

[73] Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 205.

children would assist them in the fields, thereby ensuring that there would be no place for idleness in Indian communities. Although there is evidence that Hayter Reed, the primary architect of this policy, had strong beliefs that social evolution could proceed only in defined stages,[74] an incident involving settlers around Battleford in 1888 also lent credence to the view that Reed wished to prevent Indian farmers from being able to compete with the local settlers.[75]

To enforce the policy, Indian agents were ordered to cancel any pending purchases of farm equipment or machinery and not to order any more. At Kahkewistahaw, where Indian farmers had already purchased tools and machinery themselves using their own money, they were to be denied permission to use them. Reserves across the prairies were filled with anger, disappointment, and confusion, and official reports from this period often contain accounts of Indian farmers who, demoralized by the struggle or exhausted by the extra labour involved in bringing in their crops, simply gave up on farming.[76]

The severalty and peasant farming policies were in effect from 1889 to 1896. These policies curtailed and reversed the development of prairie Indian economies until Reed and his policies were ousted following the election of the Laurier government in 1896. By that point, however, the subdivisions that had been accomplished were useful to departmental officials, who were able to restrict Indians to the divided portions where agents could concentrate them in smaller settlements and more effectively monitor reserve activities. In addition, Indians could also be prevented from using undivided reserve land in ways that the agents did not like.[77]

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[74] "The fact is often overlooked, that these Indians who, a few years ago, were roaming savages, have been suddenly brought into contact with a civilization which has been the growth of centuries. An ambition has thus been created to emulate in a day what white men have become fitted for through the slow progress of generations": Reed to Superintendent General, October 31, 1889, Department of Indian Affairs, *Annual Report*, 1889, 162.

[75] Settler opposition to Indian farming reached such a pitch around Battleford that a petition was delivered to the local Member of Parliament in 1888. Hayter Reed is reported to have promised that the Department "would do whatever it reasonably could to prevent the Indians from entering into competition with the settlers during the present hard time": *Saskatchewan Herald*, October 13, 1888.

[76] See the summary provided by Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 220-22.

Local Pressure to Surrender Crooked Lake Reserves

The 1896 election saw Clifford Sifton appointed as Minister of the Interior and Superintendent General of Indian Affairs, the latter position equivalent to the current Minister of Indian Affairs. The Departments of the Interior and Indian Affairs were temporarily placed under a single Deputy, and prairie Indian agencies were reorganized and downsized.[78] Central control was increased and, because of Sifton's lack of background in Indian Affairs and his "perspective that Indian assimilation in 'white' society took second place to rapid economic development,"[79] the primary focus of the combined department was to attract new settlers and to develop western Canada economically.

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[77] In 1904, for example, an individual Band member opposed to the prospective surrender of the southernmost reserve lands at Cowessess was refused permission to locate himself there because the land had not been subdivided and, therefore, no location ticket giving him a lawful right to reside there could be issued. See J.A. Sutherland to Assistant Indian Commissioner J. McKenna, June 14, 1904, NA, RG 10, vol. 3651, file 82, pt. 4.

[78] D.J. Hall, "Clifford Sifton and Canadian Indian Administration, 1896-1905," in I.A. Getty and A.S. Lussier, eds., *As Long as the Sun Shines and the Water Flows* (Vancouver: Nakoda Institute and UBC Press, 1979), 122.

[79] John Leslie and Ron Maguire, eds., *The Historical Development of the Indian Act*, 2d ed. (Ottawa: DIAND, Treaties and Historical Research Branch, 1978), 104.

As a result of Sifton's policies, so many immigrants flocked to western Canada that, in the 10 years from 1896 to 1905, the population grew by nearly one million.

The Surrender Request of 1885

Local pressure to open up the Cowessess, Kahkewistahaw, and Ochapawace reserves for settlement began as early as 1885, just a few years after these Bands had moved onto their lands on or near Crooked Lake. In a letter to Prime Minister Wilfrid Laurier and the Minister of the Interior, Thomas Evans, the local Justice of the Peace in nearby Broadview complained that "the Indian Reserve ought to be removed as soon and as speedily as the government can affect [sic] it . . . and so open up a large and fine tract of country for settlement, that is all, presently, worse than useless."[80] Indian Commissioner Edgar Dewdney was asked to report on the matter, but no immediate action was taken.

The Request of 1886

Following a visit of the Minister of the Interior to the area in early 1886, the Deputy Minister of Interior wrote to the Deputy Superintendant General of Indian Affairs, Lawrence Vankoughnet, on March 4, 1886, stating that:

> . . . the settlers in the neighborhood of Moosomin brought to the Minister's attention the fact that the Indian Reserve in question lies immediately alongside of the Canadian Pacific Railway; that it would

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[80] Thos. Evans, Justice of the Peace, to Sir David L. MacPherson, Minister of the Interior, and the Prime Minister, May 26, 1885, NA, RG 10, vol. 7542, file 29108-1 (ICC Documents, pp. 62-66).

> be desirable in the public interest and in the interest of the Indians themselves that they should be moved back six miles from the railway; that this object can be accomplished by giving to the Indians a greater frontage along the river, and that out of available land in that vicinity, which could be given them in a block, they could have this readjustment of their reserve made so as to give to each member of the band an area not less than 160 acres. To this proposition, it was represented to the Minister, the Indians would be perfectly willing to agree, and as he is confident that the public interest and the advantage of the Indians would be equally [unreadable] by some such arrangement.
>
> I am to ask whether you do not agree with him in thinking it expedient to open negotiations with the Indians for the purpose of ascertaining their views.[81]

In his reply, Indian Agent McDonald did not favour the proposal for an exchange and stressed the importance of the southern portion of the Crooked Lake reserves for haying purposes. Even if the Bands were given alternative lands farther north along the Qu'Appelle River to obtain their hay, "the Indians will be giving up far more valuable lands than they will be receiving."[82] Following a round of internal correspondence between Indian Affairs and Department of the Interior officials, Evans's proposal was ultimately rejected.[83]

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[81] A.M. Burgess, Deputy Minister, Department of the Interior, to Edgar Dewdney, Commissioner, Department of Indian Affairs, March 15, 1886, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 76-78).

[82] A. McDonald, Indian Agent Treaty No. 4, to Indian Commissioner, March 22, 1886, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 83-85).

[83] A.M. Burgess, Deputy Minister, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, April 15, 1886, NA, RG 10, vol. 3732, file 26,623 (ICC Documents, pp. 88-90 and 91-95).

When the surrender proposal fell through, local residents sought road allowances through the reserves to provide access to the rapidly increasing settlements to the north. On August 13, 1889, the residents of Broadview and Whitewood signed a "Memorandum of acceptance of a conditional surrender of lands for road purposes by the Crooked Lake Indians," which apparently reflected an informal agreement between the local residents and the Indians for the construction of four roads through the reserves.[84] In 1890, the Crooked Lake Bands, including Kahkewistahaw, surrendered the road allowances described in the Memorandum of Acceptance. The roads were ultimately transferred to the province, but it is not clear whether any compensation was paid for the surrendered lands.[85]

The 1891 Petition

Despite these surrenders of reserve lands to allow for the contruction of roads, local interests were not appeased. In 1891, G. Thorburn and a local committee presented a petition to the visiting Minister of the Interior on behalf of the residents of Broadview, Whitewood, and the surrounding area. The committee asked that the whole of Township 17 (in which the larger part of the Crooked Lake Agency was located) be opened up "in the interest of the Town, of the Canadian Pacific

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[84] Memorandum, August 13, 1889, NA, RG 10, vol. 3556, file 25, pt. 4B (ICC Documents, pp. 104-05).

[85] The surrender for road allowances was accepted by an Order in Council dated March 7, 1893. In 1902, when it became apparent that local residents could not fulfil the terms of the Memorandum of Acceptance, the Department sought to obtain a new surrender allowing the roads to be transferred to the territorial government. Kahkewistahaw provided a second surrender of the road allowances on October 29, 1902. NA, RG 10, vol. 3556, file 25, pt. 4B (ICC Documents, pp. 181-85).

Railway, the settlement of the country and its general interest."[86] Again called upon to respond, McDonald repeated his earlier concern that the southern lands were needed for hay by the Indian farmers of Cowessess, Kahkewistahaw, and Ochapawace:

> The same objection to the relinquishment of part of Township 17 still applies, viz. that the chief and best part of the Hay lands belonging to Bands Nos. 71, 72 & 73 are in the land referred to, and *although I am most anxious that the views of the people of Broadview should be met, still from my position as Indian Agent I am bound in the interests of the Indians to point out the difficulties in the way, which are tersely these. If these lands are surrendered by the Indians, no reasonable money value can recompense them, as their Hay lands would be completely gone, and this would necessitate no further increase of stock, which would of course be fatal to their further quick advancement, and would be deplorable, and the only alternative that I can see is to give them Hay lands of equal quantity and value immediately adjacent to the Reserves interested, which I do not think is possible now. . . .*
>
> If it was contemplated by the Committee that waited upon you on the 26th ultimo to have the whole of Township 17 in Ranges 3, 4, 5 & part of 6 surrendered, I would beg to point out that very little of the whole Reserve remains.[87]

Once again, McDonald's views prevailed and the resolution was rejected by the Department.[88]

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[86] Resolution presented by the Residents of Broadview to the Minister of the Interior, February 2, 1891, NA, RG 10, vol. 3732, file 26,623 (ICC Exhibit 14).

[87] A. McDonald, Indian Agent, to Superintendent General of Indian Affairs, March 10, 1891, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 118-20). Emphasis added.

[88] [unknown] Ottawa, to G. Thorburn, Broadview, April 16, 1891, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 122-25).

The 1899 Request

It was not long, however, before yet another effort was made by the local settlers to have the Crooked Lake reserves reduced in size for the benefit of the adjacent non-Indian communities. R.S. Lake, a member of the North-West Territories Legislative Assembly, made a direct appeal to Clifford Sifton in 1899 on the grounds that Kahkewistahaw and the other Crooked Lake Bands had a large surplus of land according to the treaty formula of 1 square mile per family of five.[89] Sifton agreed to have the Department look into it so long as Lake understood "that it depended altogether on the consent of the Indians."[90]

A.W. Ponton, a departmental surveyor, prepared a memorandum in response in which he recommended that the Indian Agent be instructed to try to obtain a surrender:

> Referring to Mr. Lake's memorandum, re: the excess of land held by the Indians of reserves in the Crooked Lake agency . . . I would say that Mr. Lake's figures are correct according to the census of 1898 and the excesses explained by the decrease in the numbers of the Indians of these reserves since the allotment was first made. When Agent A. McDonald reported (Annual Report 1882) "The area of each reserve has been allotted to each band in proportion to the pay sheets of 1879,

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[89] In a handwritten memorandum, R.S. Lake stated that Kahkewistahaw was entitled to 26 square miles, based on the Band's population. After the surrender of a proposed 25½ square mile strip, he reasoned that the Band would still be left with 47½ square miles. If that land were sold for $2.50 per acre, he calculated that it could provide about $10.00 annually for each member of the Band, based on 3 per cent interest: NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 140).

[90] Clifford Sifton, Superintendent General of Indian Affairs, to J.A.J. McKenna, Department of Indian Affairs, January 19, 1899, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 133).

> the year in which the largest number of Indians were paid their annuity."
>
> I would strongly advocate the adoption of Mr. Lake's suggestion, for the reason that the Indians are not benefited by the land, and while it remains tied up, settlement of the large agricultural district lying South of the Railway is prevented owing to the lack of market towns between Whitewood and Grenfell. . .[91]

However, the new Crooked Lake Indian Agent, J.P. Wright, saw things in much the same way as his predecessor. He is reported to have disagreed strongly with Ponton's suggestion because the lands in question were still being productively used as hay grounds by the Cowessess, Kahkewistahaw, and Ochapawace Bands. He cautioned that "it would be unwise to ask them to make a surrender at this time."[92] Sifton concurred and forwarded these views to Lake, who did not press the matter.

The 1902 Proposal and Petition

Nonetheless, just three years later, in the winter of 1902, the new Indian agent, Magnus Begg, apparently did not share Wright's views and proposed that a much smaller portion of the reserves be removed, with the proceeds applied to debts incurred by the Indian farmers for machinery and equipment. Judging from what transpired later, it would appear that Begg had been discussing this matter with local settlers. His suggestion that a 3-mile strip along the southern boundary of the agency be surrendered was rejected by Indian Commissioner Laird, however, who reminded Begg that these were good hay lands and that "[w]here there are so many cattle (and the number ought to be increased) it would never do to have the Indians short of hay."[93]

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[91] A.W. Ponton, Surveyor, to J.A.J. McKenna, Department of Indian Affairs, February 17, 1899, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 136-38).

[92] David Laird, Indian Commissioner, to Clifford Sifton, Superintendent General of Indian Affairs, April 2, 1899, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 142-43).

Shortly afterwards, in the spring of that same year, the residents of Broadview, Whitewood, and the surrounding district forwarded yet another petition to Clifford Sifton seeking the surrender of the same 3-mile strip to which Begg had referred. The petition contained a large number of signatures - more than 180 - from a broad spectrum of the community, including members of the Legislative Assembly, ministers, doctors, tradespeople, merchants, railway employees, teachers, postmasters, and several farmers. Given this political pressure, Sifton requested that the matter be looked into and that the petitioners be assured "that the Department will do its best to procure the consent of the Indians; and that an officer will be detailed for that purpose."[94]

Indian Commissioner Laird met with the Cowessess and Kahkewistahaw Bands on April 16 that year to discuss the matter with them. His subsequent report to headquarters noted that he "found the Indians strongly opposed to surrendering any portion of their reserves" and contained a verbatim extract of the speeches of some of the chiefs and headmen. Chief Kahkewistahaw himself, aging, blind, and in poor health, spoke in opposition to the proposed surrender, reminding Laird (who had signed Treaty 4 on behalf of the Crown) of the original treaty promises:

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[93] David Laird, Indian Commissioner, to Indian Agent, Crooked Lake Agency, January 22, 1902, NA, RG 10, vol. 3561, file 82/4 (ICC Documents, pp. 163-64).

[94] A.P. Collier, Department of the Interior, to J.D. McLean, Secretary, Department of Indian Affairs, March 31, 1902, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 173); J.D. McLean, Secretary, Department of Indian Affairs, to David Laird, Indian Commissioner, April 2, 1902, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 174).

> I will tell you what I think. I was glad when I heard that you were coming to see us. *When we made the treaty at Qu'Appelle you told me to choose out land for myself and now you come to speak to me here. We were told to take this land and we are going to keep it. Did I not tell you a long time ago that you would come some time, that you would come and ask me to sell you this land back again, but I told you at that time, No.*[95]

Laird's subsequent report to J.D. McLean, Secretary of the Department, acknowledged the force of the arguments advanced by the Indian speakers. Laird noted that "the best of their land is the part asked to be surrendered" and that the land farther north nearest the river "is gravelly and not well adapted for farming."[96] Following this report, the question of a surrender was dropped.

The 1904 Request

The respite was a brief one, however. Many residents of the area, apparently undeterred, individually wrote to Sifton to have the Crooked Lake reserves opened up for purchase by settlers. Finally, in early 1904, Sifton responded by directing Assistant Indian Commissioner J.A. McKenna to look into the matter, but from the vantage point of "*whether it would be desirable from an Indian standpoint* and whether the Indians are likely to agree to it."[97] McKenna subsequently reported that such a surrender would not be in the Indians' best interests, and he reiterated the points made both in 1902 and in previous years:

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[95] David Laird, Indian Commissioner, to J.D. McLean, Secretary, Department of Indian Affairs, May 6, 1902, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 175-77). Chief Kahkewistahaw's headman, Wahsacase, made a similar appeal to Laird, stating, "I find that my reserve is small enough." Emphasis added.

[96] David Laird, Indian Commissioner, to J.D. McLean, Secretary, Department of Indian Affairs, May 6, 1902, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 175-77).

[97] Clifford Sifton, Superintendent General of Indian Affairs, to Frank Pedley, Deputy Superintendent General of Indian Affairs, March 8, 1904, NA, RG 10, vol. 3732, file

> I would point out that the Commissioner in his report of the 6th of May 1902 stated that there was a good deal of force in the remarks of some of the Indians; that the best of the land in Reserves 71 & 72 was contained in the part asked to be surrendered; and that the best wood was also on the South of the Reserves. This being so it would not be advisable from an Indian standpoint, to dispose of the land.[98]

Noting that Commissioner Laird had relatively recently convened the Cowessess and Kahkewistahaw Bands for the purpose of discussing the proposed surrender, McKenna also advised against calling them together once more for this purpose, "for it might create the impression that the Department is acting for the settlers in the matter." He counselled caution and suggested that the local agent instead "inquire quietly as to the mind of the Indians and report."[99]

Mandated to make such an inquiry, Indian Agent Begg died before being able to carry it out. At the treaty annuity payments that year, the departmental officer in charge of the payments, Mr Lash, is reported to have explained to the assembled members of the Crooked Lake Bands "the benefit they would derive by surrendering a strip of the reserve and a portion of the proceeds received from the sale being used to fence the reserve." According to Commissioner Laird, "[t]he

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26623 (ICC Documents, p. 197). Emphasis added.

[98] J.A. McKenna, Assistant Indian Commissioner, to Secretary, Department of Indian Affairs, March 19, 1904, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 200).

[99] J.A. McKenna, Assistant Indian Commissioner, to J.D. McLean, Secretary, Department of Indian Affairs, March 19, 1904, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 199-201).

Indians appeared to appreciate the suggestion, but wanted time to think it over." Laird also suggested that, once Begg's replacement had been appointed, it might be opportune to make another approach to the Crooked Lake Bands armed with the authority to promise them "say 10% of the proceeds of sale to be expended for their benefit in farming outfits and in a per capita payment in cash or for liquidation of debts." In the meantime, Laird advised that "it would not be well to push the matter too hastily, as it is one that requires very careful handling."[100]

Prelude to the Surrender: A New Attitude in the Department

Nothing further was done that year or the next to follow up on Laird's suggestion. By 1906, William Graham[101] had been promoted to Inspector of Indian Agencies in southern Saskatchewan, and Clifford Sifton had been replaced as Minister of the Interior and Superintendent General of Indian Affairs by Frank Oliver, a former editorial writer for the Edmonton *Bulletin* who had long campaigned to free up reserve land for settlement.

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[100] David Laird, Indian Commissioner, to J.D. McLean, Secretary, Department of Indian Affairs, March 19, 1904, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 207-08).

[101] During Sifton's administration, William Graham enjoyed some prominence in the Department as a result of his unstinting efforts to "civilize" prairie Indians and the apparent success of his File Hills Colony of Indian farmers. File Hills was an Indian farming settlement directly supervised by Graham and populated by hand-picked Indian candidates. Forbidden to maintain contact with Indian traditionalists, the young colonists were installed on individual tracts of land and married off to each other. Because they "had internalized the white man's religion and culture and . . . were self-sufficient farmers," it was hoped they would set the example for a whole new generation of prairie Indians. Impressed by the progress of this experiment, Sifton promoted Graham's career and mentioned his accomplishments in Parliament on a number of occasions: Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 19, nn. 64 and 65.

Oliver's appointment in 1905 brought wholesale changes in the official attitude of the Department towards the reserve land question. In response to an inquiry in the House of Commons by R.S. Lake[102] about the proposed Crooked Lake surrenders, Oliver replied that "[t]he case of the Broadview reserve is only one of many in the west, and it is no doubt a hardship to the surrounding country and to large business enterprises." He noted that "*of course the interests of the people must come first and if it becomes a question between the Indians and the whites, the interests of the whites will have to be provided for.*"[103]

This attitude quickly pervaded the Department. In his annual report to the Minister for 1908, Deputy Superintendent General Frank Pedley conveyed a similar philosophy:

> The large influx of settlement of recent years into the younger provinces has dictated a certain modification of the department's policy with relation to the sale of Indians' lands.
>
> So long as no particular harm nor inconvenience accrued from the Indians' holding vacant lands out of proportion to their requirements, and no profitable disposition thereof was possible, the department firmly opposed any attempt to induce them to divest themselves of any part of their reserves.
>
> Conditions, however, have changed and it is now recognized that where Indians are holding tracts of farming or timber lands beyond their possible requirements and by so doing seriously impeding the growth of settlement, and there is such demand as to ensure profitable sale, the product of which can be invested for the benefit of the Indians

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[102] The same member who had approached Sifton directly in 1899.

[103] Canada, House of Commons, *Debates*, March 30, 1906, pp. 947-50. Emphasis added.

> and relieve *pro tanto* the country of the burden of their maintenance, it is in the best interests of all concerned to encourage such sales.[104]

In keeping with these sentiments, one year after his appointment Oliver sponsored an amendment to the *Indian Act* allowing up to 50 per cent of the proceeds of a surrender and sale to be distributed immediately to band members.[105] Previously, the *Indian Act* had limited such cash distributions to 10 per cent of the sale price, with the rest to be held in trust in a capital account for the band in question. Oliver was quite candid in explaining to the House of Commons his motivations for seeking the amendment:

> This [10 per cent cash distribution] we find in practice, is very little inducement to them to deal for their lands and we find that there is very considerable difficulty in securing their assent to any surrender. Some weeks ago, when the House was considering the estimates of the Indian Department, it was brought to the attention of the House by several members, especially from the Northwest, that there was a great and pressing need of effort being made to secure the utilization of the large areas of land held by Indians in their reserves without these reserves being of any value to the Indians and being a detriment to the

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[104] Canada, Parliament, *Sessional Papers*, 1908, no. 27, "Annual Report of Deputy Superintendent General to Superintendent General, September 1, 1908," xxxv.

[105] SC 1906, c. 20, s. 1 (amending s. 70 of the Act). Royal Assent was given on July 13, 1906. This was not the only *Indian Act* amendment promoted by Oliver to reduce in size or eliminate Indian reserves. In 1911, two others were passed, together referred to by Indians as the "Oliver Act." The first allowed public authorities to expropriate reserve land without the need of a surrender. Any company, municipality, or other authority with statutory expropriation power was enabled to expropriate reserve lands without Governor in Council authorization so long as it was for the purpose of public works. The second allowed a judge to make a court order that a reserve within or adjoining a municipality of a certain size be moved if it was "expedient" to do so. There was no need for band consent or surrender before the entire reserve could be moved. SC 1911, c. 14, ss. 1 and 2, respectively.

> settlers and to the prosperity and progress of the surrounding country.[106]

The new provision proved its usefulness almost immediately, for the next year the Department was able to dispose of the longstanding and troublesome issues associated with the St Peter's reserve in Manitoba. A series of doubtful land transactions involving settlers at St Peters since the 1870s culminated in several investigations and inquiries between 1878 and 1900, none of which resolved the competing claims to lands within the reserve boundaries. Finally, in September 1907, Deputy Superintendent General Pedley came to the reserve in person, reportedly carrying a briefcase containing $5000 in cash, and managed to get the desired surrender.[107] The surrender document called for disbursement to the Band of 50 per cent of the proceeds of sale one year following the surrender.[108] Indian discontent surfaced later, however, and ultimately the surrender was attacked in Parliament on the basis that "the methods employed by the government agent had been anything but creditable to the government."[109]

Inspector Graham seems to have been imbued with much the same spirit as Oliver, for he made it his business to follow up on Laird's earlier suggestion that the possibility of a surrender at Crooked Lake be quietly investigated. In June 1906, he wrote directly to the Minister reporting on his recent visit to the agency, indicating the possibility of obtaining the desired surrenders:

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[106] Frank Oliver, House of Commons, *Debates*, June 15, 1906, 5422.

[107] Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 22.

[108] For a review of the St Peter's claim, see "The St. Peter's Reserve Claims," in R. Daniel, *A History of Native Claims Processes in Canada, 1867-1979* (Ottawa: DIAND, Research Branch, February 1980), 104-21.

[109] It was attacked by the member for Selkirk, G.H. Bradbury. House of Commons, *Debates*, March 22, 1911, cols. 5837 ff.

> I am satisfied that if this matter were handled promptly and on about the same lines as the Pasquah's surrender was obtained, these Indians would consent to sell. In fact, I feel sure that if I had the papers and money with me when I was there I could have obtained the surrender. . . .
>
> . . . *The trouble in the past has been due to the fact that too many people have been dabbling in the matter.* The people in the adjacent towns are keen for the surrender, and as a result, the Town Council, the Board of Trade and individuals have been talking to the leading Indians, and they now have all kinds of ideas of their needs. In my opinion, *the matter should be handled by our own people, without the knowledge of the outside public*, as was done at Pasquah's. . . .
>
> . . . As this is a large deal it would be necessary to have the matter thoroughly decided upon before the proposition is put to the Indians, because it would have a bad effect if the Department had to go back to them with a second proposition. *Outsiders would interfere in the interval as in the past.* If a little latitude were given to the Officer taking the surrender, he could perhaps meet any small request, that would come from the Indians at the meeting.[110]

Moreover, Graham thought it could be done with an inducement of one-tenth of the proceeds of sale.

In response, Oliver ordered the Deputy Superintendent General to have "a proper basis for the surrender" prepared,[111] and Secretary McLean asked Graham how much land ought to be surrendered.[112] Graham proposed a total of 90,240 acres – including 32,640 acres from Kahkewistahaw, 36,480 acres from Cowessess, and 21,120 acres from Ochapowace – and recommended the following course of action:

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[110] W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Frank Oliver, Superintendent General of Indian Affairs, June 19, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 231-33). Note that the *Indian Act* had not yet been amended to allow the 50 per cent cash distribution mentioned above. Emphasis added.

[111] [Name unreadable], Department of the Interior, to Frank Pedley, Deputy Superintendent General of Indian Affairs, June 28, 1906, NA, RG 10, vol. 3732, file 26623

> The Department are [sic] aware that several futile attempts have been made to get this surrender. I am of the opinion however, that it can be obtained if handled judiciously. The money for the first payment should be on hand the day the meeting asking for the surrender is held, and the whole matter should be handled with dispatch.[113]

The necessary authority was then provided to Graham and the surrender forms and a cheque for the required cash were forwarded to him in early October 1906.[114] According to the surrender documents, Graham was to seek a surrender of 33,281 acres of Kahkewistahaw's reserve. This amount was apparently calculated to leave the Band with almost exactly 160 acres per person for each of its 84 members.[115] Disease, deprivation, and starvation had contributed to reducing the size of the Band from the population of approximately 365 for which 128 acres per person had been surveyed at the time the reserves were created. Graham advised

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(ICC Documents, p. 234).

[112] J.D. McLean, Secretary, Department of Indian Affairs, to W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, July 6, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 239).

[113] W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, September 24, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 247-48).

[114] J.D. McLean, Acting Deputy Superintendent General of Indian Affairs, to W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, October 3, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 252).

[115] Submissions on Behalf of the Government of Canada, January 26, 1996, p. 12.

that he would proceed to Crooked Lake as soon as he had dealt with the remaining obligations related to the surrender at the Pasqua reserve. "[I]n the meantime," he added, "I do not consider that a delay will have any prejudicial effect on the proposition, in fact, I think it will have a contrary effect."[116]

As later events demonstrated, Graham's assessment was an accurate one. He did not visit the Crooked Lake Agency until January 1907, in the middle of the winter when illness and the need for rations would be intensified among the Crooked Lake Bands. The testimony of many of the elders from Crooked Lake seemed to bear this assessment out.[117]

Graham's mission was no doubt materially assisted as well by the deaths of Chief Kahkewistahaw and headmen Wasacase and Louison before the annuity payments in 1906. It was not uncommon in the years following the Riel Rebellion in 1885 for Canada to remove "unprogressive" Indian leaders or to fail to replace deceased Chiefs, so that Cree bands would be kept leaderless and incapable of hostile action against Canada. This policy was maintained for some time to ensure that only candidates acceptable to the Department became leaders, and thereby to assure the smooth implementation of government policies. Although Kahkewistahaw's support of Canada during the rebellion was considered exemplary, he and his headmen were also an impediment to obtaining a surrender of the reserve. Despite requests by Band members, Kahkewistahaw and his headmen were not replaced until 1911. As a result, the Band faced the prospect of a surrender vote without the Chief who had so forcefully refused to surrender any part of IR 72 in previous years and without the benefit of a new Chief to succeed him. It is worth noting that, subsequent to the 1907 surrender, Joe Louison (one of the men who opposed the surrender) was elected Chief of the Kahkewistahaw Band.

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[116] W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, October 3, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 253-54).

[117] ICC Transcript, May 3, 1995, pp. 34, 36-37, and 58 (Joseph Crowe); ICC Transcript, May 3, 1995, p. 76 (Ernest Bob), regarding the suffering of the people due to illness and hunger.

The 1907 Surrender Meetings

The law governing reserve land surrenders at that time was set out in the 1906 version of the *Indian Act*, which stated that no surrender was valid unless "assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council therefor summoned for that purpose." In addition, any surrender assented to in this manner had to be placed before a judge to be "certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote."[118]

In early December 1906 before going to the Crooked Lake Agency, Graham took the precaution of writing to headquarters to ensure that the second payment called for in the Pasqua surrender agreement would be paid out to the Band members. His reasoning was that the Crooked Lake Bands might be more willing to make the surrenders requested if they knew that their neighbours on the Pasqua reserve had received the full 10 per cent of the proceeds of sale promised to them.[119]

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[118] *Indian Act*, RSC 1906, c. 81, s. 49.

[119] W.M. Graham to Secretary, Department of Indian Affairs, December 7, 1906, NA, RG 10, vol. 2389, file 79,921.

On January 21, 1907, Graham set out to obtain surrenders from the three Crooked Lake Bands. Before going to the Kahkewistahaw reserve, Graham visited Cowessess to discuss a surrender proposal. The next day, he travelled to Ochapawace, where he tried to obtain a surrender on the spot, but he was rebuffed by a vote of 16 against and only 4 in favour.[120] From Ochapawace he went on to Kahkewistahaw, arriving on January 23, 1907.

Departmental statistics prepared in anticipation of the Kahkewistahaw surrender meeting indicated that the Band had a population of 84 persons, only 19 of whom were men over 21 years of age.[121] An analysis of the paylist information from 1906 and 1907, however, suggests that there were as many as 25 to 28 members of the Band who were eligible to vote.[122] As it turned out, 19 eligible male voters assembled for the January 23 surrender meeting at McKay's Mission Church on the reserve. Six other persons were present, including Graham, Indian Agent Matthew Millar, interpreter Peter Hourie, and three others - Mr Sworder, Mr Nichols, and Mr Sutherland.

There is no written record of the meeting other than the Minutes drawn up by Millar. They state that "Mr. Inspector Graham . . . very fully and at length explained the terms of the proposed surrender pointing out its meaning to the

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[120] W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 277-80).

[121] W.A. Orr, In Charge, Lands & Timber Branch, Department of Indian Affairs, to Secretary, Department of Indian Affairs, July 3, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 237-38).

[122] Submissions on Behalf of the Kahkewistahaw First Nation, January 26, 1996, pp. 32-33.

Indians asking them as intelligent men to very carefully consider the proposal and to act by their vote according to the decision which each one may come to."[123] The vote was then taken, and the proposed surrender was rejected by a vote of 14 to 5.

What happened next is not entirely clear. In a reporting letter to headquarters written several weeks later, Graham stated that "[a]s soon as this meeting was over, the Indians held meetings among themselves and a deputation came to see me asking for another regular meeting."[124] Millar's version was similar, noting that "some of them had not fully understood the conditions and now wished to reverse their vote."[125]

There is no other documentary evidence indicating why the voting members of the Kahkewistahaw Band suddenly indicated a willingness to reverse their position after an already lengthy meeting at which the surrender had been discussed for at least two hours and following several years of petitions during which talk of a proposed surrender had been in the air. The accounts offered by Graham and Millar are evidently incomplete. Moreover, Millar's report one week later that the assembled members did not "fully understand the conditions," realizing this only after the actual vote had been taken, contradicts his earlier account in the Minutes of January 23 that Graham had "very fully and at length explained the terms of the proposed surrender."

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[123] Matthew Millar, Indian Agent, Crooked Lake Agency, Minutes of Surrender Meeting, January 23, 1907 (ICC Documents, pp. 265-66).

[124] W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 277-80).

[125] Matthew Millar, Indian Agent, Crooked Lake Agency, Minutes of Surrender Meeting, January 28, 1907 (ICC Documents, pp. 267-68).

The elders interviewed during the course of our inquiry related what they had heard from their parents and others who knew of those events. In keeping with the more general history outlined earlier in this report, they spoke of the Band's total lack of leadership,[126] with the result that "they had total control over us at all times,"[127] to such an extent that departmental officals "made our people surrender"[128] and "forced us to sell our land."[129] They described the view at the time that the Band had little real choice because of the privation and suffering being experienced due to disease and hunger.[130] Regarding the actual surrender meeting, Mervin Bob recounted that "they were told if they disagreed with anything that they would get no more help, so this is what my dad used to tell me."[131]

A second vote was held the following week on January 28 at the same location. This time, 17 voting members of the Band were present along with Graham, Millar, and most of the other witnesses who had been present the week earlier.[132] In the only Minutes on record of this second meeting, Millar stated that the meeting was "in response to a letter signed by a number of the voting members of the Band and addressed to Mr. Inspector Graham asking him to hold another meeting."[133] The letter to which Millar referred has never been found. Millar also recorded that "Mr. Inspector Graham again fully explained the terms of the proposed surrender after which they replied that they were ready to vote."[134]

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[126] ICC Transcript, May 3, 1996, p. 95, for instance, referred to the fact that "there was no chief at that time" (Joseph Crowe).

[127] ICC Transcript, May 3, 1995, p. 64 (George Wasacase).

[128] ICC Transcript, May 3, 1995, p. 23 (Mervin Bob).

[129] ICC Transcript, May 3, 1995, p. 34 (Joseph Crowe).

[130] Joseph Crowe referred in his testimony to sickness and epidemics that had ravaged the population and to "the resources at that time for them to live on was pretty scarce, very scarce, so, therefore, the result was starvation like or starvation conditions": ICC Transcript, May 3, 1995, p. 58. Ernest Bob added simply that "at that time there was hard times, eh, and then how the government came, the Indian agent, and told the Indians that, okay, these Indians were having a hard time to make a living, eh. . .": ICC Transcript, May 3, 1995, p. 76.

[131] ICC Transcript, May 3, 1995, p. 21(Mervin Bob).

This time Graham prevailed: the surrender proposal was accepted by a vote of 11 to 6.[135] Millar's Minutes do not indicate how long Graham spoke or whether the meeting was a lengthy one, but they give the general impression that the 17 Band members arrived with their minds more or less made up. Graham's later report paints a different picture, however, noting that it was only "after a great deal of talk [that] they finally agreed to surrender."[136]

The surrender document was in the standard form for the period, stating that the moneys were to be paid in the usual way "after deducting the usual proportion for expenses and management." Further stipulations provided that payment of one-twentieth of the estimated purchase price was to made immediately, with a further one-twentieth to be paid upon sale; the owners of improvements and buildings were to be compensated for them; the shares of minors between 12 and 18 were to be protected; and the land was to be sold at public auction. All 17 of the voters in attendance or affixed their marks to the surrender document.[137]

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[132] A comparison of the voters from the two meetings shows that two of those who had originally voted in favour of the first surrender did not attend the second meeting. Peter Hourie, the original translator, was absent, replaced by Harry Cameron.

[133] Matthew Millar, Indian Agent, Crooked Lake Agency, Minutes of Surrender Meeting, January 28, 1907 (ICC Documents, pp. 267-68).

[134] Matthew Millar, Indian Agent, Crooked Lake Agency, Minutes of Surrender Meeting, January 28, 1907 (ICC Documents, pp. 267-68).

[135] Matthew Millar, Indian Agent, Crooked Lake Agency, Minutes of Surrender Meeting, January 28, 1907 (ICC Documents, pp. 267-68).

[136] W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 277-80).

Following these formalities, Graham remained for several hours distributing the promised one-twentieth of the estimated purchase price – $94.00 per person, a considerable sum of money at that time. The next day, January 29, Graham returned to Cowessess, where he obtained a surrender on terms similar to those offered at Kahkewistahaw (except that the initial payout was one-tenth of the estimated purchase price, or twice the rate paid at Kahkewistahaw).[138] The surrender vote at Cowessess was close – 15 for and 14 against – although Graham managed to get 22 to sign or attach their marks to the actual surrender document. As at Kahkewistahaw, Graham distributed the promised cash before leaving.[139]

After concluding this part of his business at Crooked Lake, Graham went on to Moosomin on February 2, 1907, accompanied by representatives of the two surrendering bands for the purpose of swearing the certificates required under the *Indian Act*. Cowessess Chief Joe LeRat refused for some reason to attend, so

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[137] Surrender of the Kahkewistahaw Band to the Crown, January 28, 1907, Order in Council PC No. 410, March 4, 1907 (ICC Documents, pp. 270-72).

[138] The surrender meeting is described in Ken Tyler, "A History of the Cowessess Band," research paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 108-15. Tyler's conclusion is that this surrender was questionable owing to a number of irregularities.

[139] W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 277-80).

Graham brought Alex Gaddie, the Band member who had acted as interpreter during the Cowessess surrender meeting.[140] Since Kahkewistahaw was without the "chiefs or principal men" required by the *Indian Act* to swear an affidavit certifying the surrender, Graham brought an ordinary Band member, Kahkanowenapew, one of those who had voted for the surrender. The certificate in the form of an affidavit was sworn before Mr Justice E.L. Wetmore of the Supreme Court of the North-West Territories. However, since Kahkanowenapew was neither a Chief nor a principal man, it was necessary to cross out the pre-printed word "Chief" in two places on the standard form affidavit and write in its place the word "Indian." Alex Gaddie translated the affidavit for Kahkanowenapew.[141]

Graham then returned to Ochapawace, where he once again attempted to obtain a surrender, this time offering "inducements . . . nearly three times as great as those offered Cowessess Band."[142] Nevertheless, Ochapawace rejected the proposal by a vote of 19 to 5. Undaunted, Graham revised the proposal, seeking a lesser amount of land but offering a larger cash payout on surrender. This time the rejection was unanimous.[143] At this point, Graham finally gave up and left. Despite these setbacks, he was confident that once Ochapawace was able to assess what

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[140] Ken Tyler, "A History of the Cowessess Band," research paper prepared for the Federation of Saskatchewant Indians, 1975, p. 116.

[141] Affidavit of Kahkanowenapew, February 2, 1907, Order in Council PC No. 410, March 4, 1907 (ICC Documents, p. 273).

[142] W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 277-80).

[143] The surrender meetings are described in John L. Tobias, "The Ochapawace Band," research paper prepared for the Federation of Saskatchewan Indians, 1974, pp. 22-23.

Cowessess and Kahkewistahaw were able to do with their money, "they will fall into line."[144] Graham returned to Ochapawace in June 1919 when the Band had no leadership and managed to obtain the long-sought surrender in exchange for a cash payment of $110 to each Band member, in accordance with Oliver's 1906 *Indian Act* amendment.[145]

The two 1907 surrenders made a total of 53,985 acres of land available for sale.[146] From nearly 50,000 acres of reserve land, Cowessess was left with fewer than 30,000 acres. With the surrender of 33,281 acres of land, the 46,720 acres possessed by Kahkewistahaw in IR 72 fell to little more than13,000 acres. Years later, after the Ochapawace surrender in 1919, its overall holdings fell from over 50,000 to fewer than 35,000 acres. In terms of percentages, Ochapawace lost nearly 35 per cent and Cowessess lost almost 42 per cent of their respective original reserve acreages. Kahkewistahaw's proportionate loss was much higher - more than 70 per cent.[147] In all three cases, it was the southern portions of the reserves, with their more valuable hay lands and woodlots, that were lost.

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[144] W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 277-80).

[145] John L. Tobias, "The Ochapawace Band," research paper prepared for the Federation of Saskatchewan Indians, 1974, p. 25.

[146] W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 277-80).

[147] These calculations are based on the original and 1928 acreage figures provided in Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 263.

Once all the details of the Cowessess and Kahkewistahaw surrenders had been dealt with, Graham wrote a long reporting letter to Secretary McLean, enclosing the surrender documents with the expressed hope "that you will be pleased with what has been done." There is no indication in any of the official correspondence that any attempt was made to ascertain whether, as Sifton had earlier put it, "it would be desirable from an Indian standpoint" to make a surrender. The focus seemed to be entirely on the advantages to the settlers in the area:

> I may add in conclusion that the people of Broadview, Grenfel [sic] and adjacent country are delighted with the prospect of having this country thrown on the market. As you are aware this land lying idle has been a great drawback to these towns and they have been trying for years to bring about a surrender.[148]

After the Surrender

One week after Graham's reporting letter to Secretary McLean, the President and the Secretary of the Broadview Board of Trade wrote directly to Minister Oliver to convey their appreciation for what "has been accomplished by the unceasing efforts of the Indian Department under your able direction," and to praise Indian Agent Millar and Inspector Graham for their services in bringing about the surrenders.[149] The surrender was submitted to the Governor in Council on February 26 that year and approved on March 4.[150] Just over a year later Oliver recommended to the Governor in Council that Graham receive a substantial raise in pay because, aside from managing his inspectorate, he "so satisfactorily furthered the wishes of the Department in connection with land matters" by obtaining these (and other) surrenders.[151]

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[148] W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 277-80).

[149] Broadview Board of Trade, to Frank Oliver, Minister of the Interior, February 19, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 281).

The Crooked Lake lands were sold in two stages. The first sale occurred on November 25, 1908, under Graham's direction. The conditions of sale required that one-tenth of the amount bid and accepted be paid in cash at the time, with the rest to be paid in nine equal annual instalments, and interest on any outstanding balance to be payable at the rate of 5 per cent interest. Out of 322 parcels of land offered, 199 were sold at an average price of $7.15 per acre. Kahkewistahaw land accounted for $120,039.37 of the overall amount of $229,177.20 bid. Both Millar and Harry Cameron, the translator at the January 28 surrender meeting, purchased land. From these proceeds, a second payment of $94.00 was made to each member of the Kahkewistahaw Band in February 1909, and Millar was encouraged to induce Band members "to pay their debts with this money."[152]

The second sale took place nearly two years later on June 15, 1910, and all but three quarter sections offered were sold. This time the land sold for an average price of $9.93 per acre. The few parcels that remained unsold or on which the purchasers defaulted were disposed of following the end of the First World War through the Soldier Settlement Board.[153] No evidence was brought before the Commission to suggest that any further payments on account of principal were made to members of the Band beyond the two one-twentieth instalments of $94.00 per person. However, it does appear that the balance was initially invested on behalf of the Band and that interest payments were made to the Band for at least those few years following the surrender for which the reports of the Indian Agent are before us. In 1910, the interest payment was forwarded to Millar with these instructions:

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[150] Order in Council PC No. 410, March 4, 1907 (ICC Documents, p. 286).

[151] Submission to the Governor in Council by Frank Oliver, Superintendent General of Indian Affairs, April 8, 1908, NA, RG 10, vol. 1127, file 639 (ICC Documents, pp. 327-28).

[152] Secretary, Department of Indian Affairs, to M. Millar, Indian Agent, February 19, 1909, NA, RG 10, vol. 3732, file 26623-1 (ICC Documents, p. 388).

> Enclosed also is a cheque no. 5449 for $1176.00 for distribution to Kakewistahaw's Band on account of Interest Funds at their credit. Care should be taken that the Indians spend this money judiciously in paying their debts and in purchasing necessary supplies, seed, etc. Where there are old people dependent on the Dept. their money should be retained by you and expended monthly as required in supplies such as food, clothing, comforts, etc. This is not the full amount of interest at the credit of this Band but it is a substantial payment on account thereof and all that it is considered in the interests of the Indians to pay them at present. The balance will remain at their credit & be available to meet other requirements of the Band.[154]

In the Annual Reports submitted by Indian Agent Millar from 1909 to 1913, the apparent benefits of the these annual distributions of interest were described in glowing terms. In 1910, Millar stated:

> The conditions under which this band live in regard to dwellings, food and clothing, have steadily improved. In my opinion this is largely the

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[153] The sales are described in Ken Tyler, "Government of Canada and Kahkewistahaw Band," undated, pp. 89-91 (ICC Exhibit 18).

[154] Secretary, Department of Indian Affairs, to M. Millar, Indian Agent, February 10, 1910, NA, RG 10, vol. 3732, file 26623-1 (ICC Documents, p. 406).

> result of the use made of their income from interest accruing from surrendered land. Especially useful is this income to old people who have no means of making their own living. . . .
>
> In March payment of interest money from land fund was made to Cowessess and Kahkewistahaw bands. These payments came most opportunely at a season of the year when most needed; these payments enable the Indians to settle their debts and provide many useful supplies; they are especially useful in assisting the old people.[155]

The following year, Millar reported:

> The interest accruing from surrendered land provides for the old people many luxuries that they could not otherwise obtain. . . .
>
> Three out of the four bands in this agency have a land fund from which interest payments were made in March. These payments came very useful after so severe a winter, enabling the Indians to provide much of the necessary supplies for spring work. While some of this money is foolishly expended, still on the whole it does much good, especially for the old and helpless people, and the system of holding the capital intact and distributing the interest is a good one.[156]

The reports from the following two years were in much the same vein.[157]

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[155] Matthew Millar, Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs, May 18, 1910, Canada, Parliament, *Sessional Papers*, 1911, *Annual Report of the Department of Indian Affairs*, 1910, 127 (ICC Documents, p. 410).

[156] M. Millar, Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs, May 18, 1911, Canada, Parliament, *Sessional Papers*, 1912, *Annual Report of the Department of Indian Affairs*, 1911, 137 (ICC Documents, p. 423).

[157] W. [sic] Millar, Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs, May 26, 1912, Canada, Parliament, *Sessional Papers*, 1913, *Annual Report of the Department of Indian Affairs*, 1912, 141 (ICC Documents, p. 428); M. Millar, Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs, June 3, 1913, Canada, Parliament, *Sessional Papers*, 1914, *Annual Report of the Department of Indian Affairs*, 1913, 137 (ICC Documents, p. 423).

In his report entitled "The Government of Canada and Kahkewistahaw Band," Ken Tyler balanced Millar's comments with some of the drawbacks of the surrender:

> Indian Agent Matthew Millar repeatedly stressed the benefits of these interest payments, recounting how they helped the Band members pay off their debts in the spring, or how they helped the old people purchase a few necessities, or even luxuries, now and again. He did not pay the same attention to the hardships which the surrender [had] brought about. Early [in] 1908, he did acknowledge that, "most of the Indians who farm on this reserve (Kahkewistahaw's) were required to establish new places this year, their old holdings being within the surrendered area." Two years later he made passing reference to another hardship which the surrender had imposed upon the Kahkewistahaw Band, when he noted that because of the scarcity of hay, the cattle herds had had to be reduced.[158]

By 1914, the new Indian Agent for the Crooked Lake Agency, E. Taylor, reported that many of the Indians within the agency appeared to have lost their interest and ambition:

> Cattle. – . . . Very few of the Indians have any desire to increase their small herds of cattle, and this is most regrettable, as cattle-raising would be far more profitable and satisfactory with many of them than grain-growing.
>
> Characteristics and Progress. – Owing to tribal customs, the progress in this agency is slow. The younger generation of the Kahkewistahaw band are disappointing and appear to rely to a great

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[158] Ken Tyler, "Government of Canada and Kahkewistahaw Band," undated, p. 92 (ICC Exhibit 18).

> extent on interest money from surrendered land as a chief support, and they dislike to take advice.[159]

Within the same time frame, Indian discontent surfaced in the form of a treaty revival movement, which culminated in the creation of treaty discussion groups among the Crooked Lake Bands. This movement, which originated at a meeting in June 1910 on the Cowessess reserve, had the twin goals of restoring Crooked Lake treaty rights and rectifying the various problems that had arisen over the years, including those associated with the surrenders. Louis O'Soup, formerly a prominent farmer on the Cowessess reserve, had by then returned from Manitoba and soon became one of the movement's most influential leaders. Isaac and Kahkanowenapew were the initial Kahkewistahaw representatives. The meetings continued into the winter and spring of 1911, and only the older men who could remember the treaty promises were allowed to take part. By then, Alec and Mesahcamapeness (and possibly others) had also become active participants on behalf of the Kahkewistahaw Band. Before long, the participating members of the Crooked Lake Bands were joined by representatives of other reserves in the region.

Ultimately, messengers were sent to the Moose Mountain, Pelly, Qu'Appelle, and Touchwood agencies to invite further representation, with the goal of sending a delegation to Ottawa. Money was donated by Band members, with those who could not afford to make the trip composing letters to be taken by those who could. Kahkanowenapew was chosen to represent the Kahkewistahaw Band.

Early in 1911, nine men representing seven different bands journeyed to Ottawa, where they had a number of meetings with department officials, including

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[159] E. Taylor, Indian Agent, undated, Canada, Parliament, *Sessional Papers*, 1915, *Annual Report of the Department of Indian Affairs*, 1914, 58 (ICC Documents, p. 437).

Frank Oliver, between January 24 and 28. One of Kahkanowenapew's primary demands on behalf of Kahkewistahaw was that the Band be permitted to conduct elections for a chief and councillors. Another was that the Indian Agent no longer be allowed to withhold moneys due to the Band and to apply them to whatever debts may have been owed by members to creditors. Kahkanowenapew also raised the promises, which had been made by Graham at the time of taking the surrender in 1907, that the Kahkewistahaw Band would be able to make a living from the proceeds of the sale. Although it is unclear whether he challenged the surrender or reproved Graham or the Department for taking it, Kahkanowenapew did stress that life was still very hard for Band members, and urged that all the interest moneys due to them from the sale of their lands be paid as soon as possible. At the end of this round of meetings, Oliver promised that Kahkewistahaw would be allowed a chief and one councillor, that the annual interest payments due to Band members would be doubled, and that the Agent would not in future be permitted to withhold their money and apply it to their debts.[160]

Nevertheless, the federal government's policy of seeking surrenders continued. During the First World War, Indian lands remained targeted, although less for new settlement than for increased production to sustain the war effort. Following the war, the "greater production" program was retained and made even more comprehensive, with former Inspector William Graham elevated to the position of Indian Commissioner to oversee its implementation. Graham was evidently enthusiastic in his approach, and, in 1920, Saskatchewan Bishop J.A.

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[160] The discussions in Ottawa are described in "Notes of Representations Made by a Delegation of Indians from the West," January 24, 1911, NA, RG 10, vol. 4053, file 379203-2.

Newnham complained to D.C. Scott, the Deputy Superintendent General of Indian Affairs:

> You will remember that I am in correspondence with you, & with the Sask. Prov. Government about a scheme for the Sioux Band on the Round Lake Reserve. Now they have come to me in distress as they say that your Commissioner at Regina, Wm. Graham, who has "greater production" on the brain, is intending & hoping to transfer them to some Sioux Reserve near Dundurn & hand their Reserve over to Soldier Settlement, or some such thing. I beg to endorse their protest most heartily, & to urge that nothing of the sort be done. They are, though left alone by us & still pagans, a very respectable band: steady and industrious. They have been on that Reserve, or in that district for about 50 years, most of them, perhaps, have been born there, & they love their home. The I.D. [Indian Department] is supposed to be anxious to have the Indians take greater interest in farming, & to complain that they do not farm more. Surely to seize all the best of the farming land in one reserve after another is not the way to encourage them to be farmers? But this seems to be Mr. Graham's method lately; & I fear he has somehow gained the ear & the favour of the I.D. at Ottawa. He would not be in such high favour if you could hear how the Indians & the best Indian Agents speak of him. It is easy to make a reputation for success in one particular line of work, if you determine to sacrifice all other lines for that one. Mr. Graham may get the praise for "greater production", but it is the poor Indians who make the sacrifice. Greater production is good & to be sought – in a just & honest way – but it is not the whole of statesmanship. Nearly all our Indian work is suffering here because he seems to have eyes & ears & enthusiasm only for greater production. I trust you will be able to comfort these Sioux, & allay their fears, & also to see that Mr. Graham realises that his first job is that of "Indian Commissioner."[161]

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[161] J.A. Newnham, Bishop of Saskatchewan, to D.C. Scott, Deputy Superintendent General of Indian Affairs, February 10, 1920 (ICC Documents, pp. 445-46).

In later years, at least one of Canada's own officials came to question the wisdom of the Crown's earlier surrender policy. J.C. Caldwell, Chief of the Reserves Division, commented in 1939 that "[i]n the past I believe we have rather unwisely given consent to the surrender of Indian lands, when as a matter of fact, having in mind future development and requirements, such lands should have been retained for Indian use."[162]

The record before the Commission in this inquiry is virtually bare for almost 70 years from the end of the First World War until the First Nation's claim was submitted to Canada in 1989. We have no indication whether the annual payments of accrued interest on the proceeds from the surrendered land continued after 1914, or whether some or all of the principal amount was eventually paid out or remained invested for the First Nation's benefit. We understand, based on the submissions of counsel for the First Nation, that some of these questions may be researched further if it is determined that Canada owes a lawful obligation to Kahkewistahaw as a result of the circumstances surrounding the surrender.

We will turn to the question of Canada's lawful obligation, after we review briefly the effects of the surrender on Kahkewistahaw's land base in IR 72.

Impact of the Surrender on IR 72

The difference in the quantity and quality of the land base of the Kahkewistahaw First Nation before and after the 1907 surrender can only be described as shocking. That discrepancy is a material consideration in our finding that the surrender transaction was tainted. Following the survey by John Nelson in 1881, Kahkewistahaw's IR 72 comprised an area of 46,720 acres on the south shore of the Qu'Appelle River between Round Lake and Crooked Lake. The 1907 surrender resulted in the Band's interest in 33,281 acres of this land being disposed of to the Crown for sale, leaving the Band with a residual land base of only 13,439 acres.

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[162] J.C. Caldwell, Chief, Reserves Division, to H.W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, April 6, 1939 (ICC Documents, pp. 452-53).

The differences between the surrendered lands and the residual lands formed the subject matter of a report and oral testimony by David Hoffman of Hoffman & Associates Ltd. Mr Hoffman is a fully accredited appraiser with the Appraisal Institute of Canada, in addition to being a professional agrologist and a farmer in his own right. Before he established his consulting business, he was employed by the Department for almost eight years as Head of Land Administration and Superintendent of Lands, Revenues and Trusts, during which time he was actively engaged in managing Indian lands and training Indian farmers.

Mr Hoffman's report, entitled "Comparison of Soils between Surrendered and Non-Surrendered Areas of Kahkewistahaw,"[163] was commissioned by the First Nation to compare, first, the quantitative differences between the surrendered lands and the residual reserve lands in terms of the percentages of arable and non-arable land that each area contains, and, second, the qualitative differences in the arable land contained in each of the two areas. Other than inconsequential differences in approach required by the absence of standardized road allowances on the reserve and the non-categorization of off-reserve grazing lands into soil types, the report applied the Saskatchewan Assessment Management Agency's usual methods of assessing farmland to the assessment of reserve lands within IR 72, being lands that are not normally subject to municipal assessment. The report also used rounded figures for the areas of IR 72 before the surrender (47,000 acres), the surrendered lands (33,000 acres), and the residual reserve lands (14,000 acres).

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[163] Hoffman & Associates Ltd, "Comparison of Soils between Surrendered and Non-Surrendered Areas of Kahkewistahaw," undated (ICC Documents, pp. 802-57).

According to Mr Hoffman, arable land means soils which are fit for cultivation and which can be used for crop production, forage production, or grazing land, and includes both cultivatable arable land (currently cultivated or easily converted to cultivation) and unimproved arable land (currently best used as pasture, but including "bush arable soils" that should eventually be improved into cultivatable land). Non-arable soils are limited to haying or grazing purposes because of severe negative characteristics – such as extreme topography, salinity, stones, or sand – that make cultivation impossible.

The quantitative differences identified in the Hoffman report between the surrendered lands and the residual reserve lands are striking, particularly when considered in light of the map prepared by Hoffman & Associates Ltd which has been included at page 17 of this report. These differences are set forth in Table 1, which has been derived from the table entitled "Summary of Salient Facts" and from other data in the report. It can be seen from Table 1 and from the map that almost 90 per cent of the surrendered lands are arable, as compared with only 26 per cent of the residual reserve lands. Conversely, while 70 per cent of the reserve lands are non-arable, only 10 per cent of the surrendered lands fall into this category. When the combined acreages of the surrendered lands and the residual reserve lands are considered, the surrender left Kahkewistahaw with only 11 per cent of the arable land, but 75 per cent of the non-arable land, originally set apart for the Band in 1881.

TABLE 1
Kahkewistahaw Soil Analysis

Arable v. Non-arable soils		**Original Reserve (acres)**	**Surrendered Area (acres)**	**Residual Reserve Area (acres)**
Arable or Cultivatable Soils	Field crop production	22,700	21,800	900
	Other cultivatable land	675		675
	Cultivated grass	700	700	
	Improved hayland	250		250
	Unimproved hayland	100	100	
	Grazing land and bush arable land	8,125	6,300	1,825
	Subtotals (rounded)	**32,450 (69%)**	**28,800 (88%)**	**3,650 (26%)**
Non-arable or Non-cultivatable Soils	Qu'Appelle Valley hillsides	1,900		1,900
	Soils with numerous surface stones	6,500		6,500
	Soils subject to flooding and salinity problems	1,050		1,050
	Waste slough (low-lying areas)	3,700	3,200	500
	Subtotals (rounded)	**13,150 (28%)**	**3,200 (10%)**	**9,950 (70%)**
Residential Sites and Road Allowances		**1,300 (3%)**	**750 (2%)**	**550 (4%)**
TOTALS (rounded)		**47,000 (100%)**	**33,000 (100%)**	**14,000 (100%)**

The second phase of Mr Hoffman's analysis was to compare the quality of the arable areas in the surrendered lands with that in the residue of IR 72. Mr Hoffman noted that, since only 26 per cent of the residual reserve land is arable, better-quality soils make up only 18 per cent of the reserve's total acreage. By way of comparison, the surrendered lands have a higher average soil quality than the residual reserve lands. Perhaps more significant is the fact that better-quality lands make up roughly 82 per cent of the arable land in the surrendered area and 72 per cent of the overall surrendered land base.

In summary, it is clear, in Mr Hoffman's view, that the residual reserve lands are significantly inferior to the lands which were surrendered by the Kahkewistahaw Band in 1907, in terms of both the *percentage* and the *quality* of arable land that each contains. It should also be noted, however, that these differences are not apparent simply as a result of the advantages of modern technical soils analysis. In the course of the community session, the Commission had the opportunity to view the reserve and was immediately struck by the remarkable and obvious differences between the residual reserve lands and the surrendered lands. As Mr Hoffman testified:

> Q. So given these features, the steep valley sides, the poorly drained soils and the rocks, would a person require any special training of any sort in soil analysis or whatever to have known that most of the existing reserve was of poor quality in 1907?
>
> A. I don't believe so. I guess the thing that comes to my mind, being I'm a farmer as well and I was raised on a farm, that people in the turn of the century, one of the things they looked for was something that was readily able to be tilled, and generally that is with horse and plough, and the one thing is -- the one thing they for sure stayed away from was anything that had any stone in it because that was virtually impossible with

that type of technology, and so I think that in my opinion at that time it would be just as noticeable as it is today if not more so.

Q.	More important?
A.	Well I wouldn't want to go in there with a horse and plough, that's all I know. . . .
Q.	So then in your opinion would the fact that most of the surrendered land is good farming land, the fact that very little of the existing reserve is of good quality land, good quality farming land and the fact that most of the existing reserve is of poor quality land have been apparent to the Indian agents and the department representatives in 1907?
A.	Well certainly the stones and the hillwash. I can't see how it couldn't be apparent. It covers such a large amount of the reserve I would have to say yes. You'd think they would notice it at that time as well.
Q.	So then in your opinion was the surrender of this 33,000 acres in 1907 from the reserve a detriment to the agricultural development of the members of the First Nation?
A.	I would say yes.
Q.	Then in your opinion was the surrender of the 33,000 acres from the reserve in the best interest of the members of the First Nation?
A.	I don't believe so.[164]

This last question is properly a matter for decision by the Commission. However, before considering this and the other aspects of legal and factual analysis required in this inquiry, we will briefly address the issues before us.

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[164] ICC Transcript, May 3, 1995, pp. 137-39 (David Hoffman).

PART III

ISSUES

The broad question before the Commission is whether Canada owes an outstanding lawful obligation to the Kahkewistahaw First Nation as a result of events arising out of the surrender of IR 72 in 1907. To assist in determining whether Kahkewistahaw has a valid claim against Canada, counsel for the parties agreed to the following issues:

I Was there a valid surrender on January 28, 1907, of some 33,281 acres of the Kahkewistahaw Reserve No. 72?

1. **Did the Crown obtain the surrender:**
    - **a) as a result of duress;**
    - **b) as a result of undue influence;**
    - **c) as a result of an unconscionable agreement; or**
    - **d) as a result of negligent misrepresentation?**

2. **Did the Crown when obtaining the surrender comply with the surrender procedures under the *Indian Act*?**

3. **Did the Crown have any trust or fiduciary obligations in relation to the surrender of 1907 to the First Nation, and, if so, did the Crown fulfil those trust or fiduciary obligations when it obtained the surrender?**

4. **Did the provisions of Treaty 4 require the Crown to obtain the consent of the Indians entitled to the Kahkewistahaw reserve prior to disposing of some 33,281 acres of the reserve, and, if so, was that consent obtained?**

II Assuming that the 1907 surrender was valid and that the road allowances were included, was the First Nation adequately compensated for those road allowances, and, if not, did the Crown breach any trust or fiduciary

obligations owed to the First Nation by failing to adequately compensate the First Nation for those road allowances?

III If the evidence is inconclusive on any of the previous issues, which party has the onus of proof?

In the course of this inquiry, an extensive body of historical documentation has been placed in evidence, the testimony of elders from the Kahkewistahaw First Nation has been heard and recorded, and lengthy submissions of fact and law have been presented by legal counsel. There is, in short, a wealth of information to assist us in our deliberations, and in Part IV of this report we propose to address the issues in two main components.

In the first part of our analysis, we will identify the technical requirements of the 1906 *Indian Act* for surrendering reserve land, and we will determine whether those requirements were met to implement the surrender validly.

Second, having regard for our mandate to determine whether an outstanding lawful obligation is owing to the First Nation, we will consider whether the Government of Canada breached any fiduciary obligations that have been superimposed by the Supreme Court of Canada on the statutory surrender regime.

PART IV

ANALYSIS

ISSUE 1 VALIDITY OF THE 1907 SURRENDER

Surrender Provisions of the 1906 *Indian Act*

In any case in which the validity of a surrender of reserve land by an Indian band is in issue, the first line of inquiry is to consider the technical provisions of the *Indian Act* relating to surrenders. In this case, the relevant provisions are set out in the 1906 version of the *Indian Act*.[165] Sections 48, 49, and 50 of the 1906 *Indian Act* prohibit the direct sale of reserve lands to third parties and set out the procedural requirements for a valid surrender. Those provisions read as follows:

> 48. Except as in this Part otherwise provided, no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Part; Provided that the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage, in the interests of the Indians, of wild grass and dead or fallen timber.
>
> 49. Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.

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[165] RSC 1906, c. 81, as amended [hereinafter 1906 *Indian Act*].

> 2. No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.
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> 3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior, county or district court, stipendiary magistrate or justice of the peace, or, in the case of reserves in the province of Manitoba, Saskatchewan or Alberta, or the Territories, before the Indian commissioner, and in the case of reserves in British Columbia, or, in either case, before some other person or officer specially thereunto authorized by the Governor in Council.
>
> 4. When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.
>
> 50. Nothing in this Part shall confirm any release or surrender which, but for this Part, would have been invalid; and no release or surrender of any reserve, or portion of a reserve, to any person other than His Majesty, shall be valid.

These statutory provisions found their philosophical origin in the *Royal Proclamation* of 1763, which stated:

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands

> reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie. . . .

The parallel surrender provisions of the 1906 and 1927 versions of the *Indian Act* have been interpreted by the Supreme Court of Canada in *Cardinal v. R.*[166] and in *Blueberry River Band v. Canada*[167] (the latter referred to hereafter as the *Apsassin* case), and by the Ontario Court (General Division) and the Ontario Court of Appeal in *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*.[168] In *Cardinal*, Estey J provided the following summary of the 1906 *Indian Act* surrender provisions:

> It has also been argued that the interpretation which is now being considered is one which exposes the membership of the band to a risk of loss of property and other rights, contrary to the general pattern and spirit of the *Indian Act*. It is perhaps well to observe in this connection that there are precautions built into the procedures of Pt. I of the Act, dealing with surrender. Firstly, the meeting must be called to consider the question of surrender explicitly. It may not be attended to at a regular meeting or one in respect of which express notice has not been

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[166] *Cardinal v. R.* [1982] 1 SCR 508; 13 DLR (4th) 321; [1982] 3 CNLR 3.

[167] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 (SCC).

[168] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, unreported, [1996] OJ No. 4188 (December 2, 1996) (Ont. CA), Laskin JA, confirming *Chippewas of Kettle and Stony Point v. Attorney General of Canada* (1995), 24 OR (3d) 654 (Ont. Ct GD), Killeen J.

> given to the band. Secondly, the meeting must be called in accordance with the rules of the band. Thirdly, the chief or principal men must certify on oath the vote, and that the meeting was properly constituted. Fourthly, only residents of the reserve can vote, by reason of the exclusionary provisions of subs. (2) of s. 49. Fifthly, the meeting must be held in the presence of an officer of the Crown. And sixthly, even if the vote is in the affirmative, the surrender may be accepted or refused by the Governor in Council. *It is against this background of precautionary measures that one must examine the manner in which the assent of eligible members of the band is to be ascertained under s. 49.*[169]

Accordingly, the procedural requirements for a surrender meeting under section 49 of the *Indian Act* can be summarized as follows:

1. a meeting must be summoned for the express purpose of considering whether to surrender the land – that is, a proposal for surrender cannot be raised at a regular meeting of the band or at a meeting where no express notice of the proposed surrender has been provided;
2. the meeting must be called in accordance with the rules of the band;
3. the meeting must be held in the presence of the Superintendent General or an authorized officer;
4. a majority of the male members of the band of the full age of twenty-one years must attend the meeting, and a majority of those attending must in turn assent to the surrender;
5. under subsection (2), only those men ordinarily resident on the reserve are eligible to vote;

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[169] *Cardinal v. R.*, [1982] 1 SCR 508; [1982] 3 CNLR 3; 13 DLR (4th) 321 at 10.

6 under subsection (3), the band's assent to the surrender must be certified on oath by the Crown and the band; and

7 under subsection (4), the surrender must be submitted to the Governor in Council for acceptance or refusal.

The first six of these criteria deal with a band's consent to the surrender of all or a portion of its reserve. Once the band has consented to the surrender, the consent of the Governor in Council must then be obtained before it can be said that the surrender is valid. We will now consider each of these criteria in the context of the present case.

Compliance with Technical Surrender Requirements

First, was the assent given at a meeting or council called for that purpose? There is evidence to suggest that a meeting was called on January 28, 1907, but the adequacy of the notice for this meeting is the subject of some dispute. The evidence before the Commission suggests that adequate notice of the meetings was provided. The First Nation asserted that it may have had as many as 25 to 28 members over the age of 21 years based on the treaty annuity paylists for 1906 and 1907, but the departmental statistics compiled for the purposes of the surrender vote suggest that there were only 19 eligible voters. In our view, the departmental records compiled at the time of the surrender provide reliable evidence of the number of members of the Band who were eligible to vote at the time of the meeting. Even if there were 25 to 28 adult male members of the Band, this discrepancy could be attributed to some men being absent or otherwise ineligible to vote because they were not ordinarily living on the reserve at the time of the surrender.

Assuming that there were 19 eligible voters at the time of the surrender, it would appear that there was adequate notice for the first meeting on January 23, 1907, because all 19 attended. With respect to the second meeting on January 28, 17 out of 19 eligible voters attended, which again suggests that adequate notice was provided. Furthermore, the records prepared by Inspector Graham and Indian Agent Millar assert that the members themselves asked for the second meeting, and there is no evidence to the contrary. The most reasonable inference to draw from these facts is that adequate notice had been given to the Band as to the time, place, and purpose of the January 28 surrender meeting.

Second, was the meeting called in accordance with the rules of the Band? Canada dismissed the argument that the Crown did not comply with the Band's rules, since "there is no evidence to establish what the band rules were." Although we have serious reservations about many of the circumstances surrounding the surrender, we note that there was a substantial turnout at the surrender meeting on January 28, 1907, as will be addressed further below. Moreover, the preprinted standard form certification affidavit sworn by Kahkanowenapew confirmed that the meeting was called "according to the rules of the Band," and we can find no specific evidence to contradict this statement.

Third, was the surrender meeting held in the presence of the Superintendent General or an officer authorized to attend on his behalf? The First Nation argued that Inspector Graham was not authorized by the Governor in Council or the Superintendent General to attend the meeting. Rather, he was given instructions to attend the surrender meeting by Secretary McLean, who was the *Acting* Deputy

Superintendent General of Indian Affairs during the summer and fall of 1906.[170] Canada submitted that Graham was authorized to attend the meeting by the Superintendent General, the equivalent of a Minister in the Indian Affairs Branch, because a memorandum outlining Graham's proposal for a surrender contains a handwritten marginal note dated September 29, 1906, which states, "approved, Go right ahead," accompanied by the letters "BOM" (an acronym for "By Order of Minister"). Canada relied on the following statement from the trial level in *Apsassin* in submitting that McLean had the authority to delegate this task to Graham:

> There is nothing in s. 51 of the *Indian Act* [s. 49 of the 1906 Act] to indicate that the Superintendent General rather than his Deputy was to *personally authorize* any individual to attend the surrender meeting. Section 31(1) of the *Interpretation Act* would therefore apply.[171]

Sections 31(f) and (m) of the *Interpretation Act*, RSC 1906, chapter 1, lend support to this interpretation:

> 31. In every Act, unless the contrary intention appears, . . .
>
> (f) if a power is conferred or a duty imposed on the holder of any office, as such, the power may be exercised and the duty shall be performed by the holder for the time being of the office; . . .

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[170] Frank Pedley was the Deputy Superintendent General of Indian Affairs at the time. Submissions on Behalf of the Kahkewistahaw First Nation, January 26, 1996, p. 116.

[171] An abridged version of the decision at trial is reported as *Apsassin v. Canada (Department of Indian Affairs and Northern Development)*, [1988] 3 FC 20 (TD). The complete text is reported as *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1988] 14 FTR 161, 1 CNLR 73 (Fed. Ct TD). Emphasis in original.

> (m) words directing or empowering any other public officer or functionary to do any act or thing, or otherwise applying to him by his name of office, include his successors in office, and his or their lawful deputy.

On this point, we concur with Canada that McLean, as the Acting Deputy Superintendent General, was "a holder for the time being of the office" of the Deputy Superintendent General and was empowered to exercise the powers that came with that office. Therefore, McLean was empowered to and did authorize Inspector Graham to attend the surrender meeting with the Kahkewistahaw Band.

Fourth, was the surrender assented to by a majority of the eligible voters? In our view, it was. During the surrender meeting on January 28, 1907, 11 of the 17 eligible voters present at the meeting voted in favour of the surrender. Since there were only 19 eligible voters in the Band, this constituted an absolute majority of all eligible voters, whether or not they attended the surrender meeting. Alternatively, even if we were to accept that there were as many as 28 eligible voters at the time of the surrender vote, the requisite majorities were obtained, since 17 of 28 eligible voters attended the meeting and 11 of those 17 voted in favour of the surrender. In *Cardinal*, Estey J rejected the argument that an absolute majority is required under the 1906 *Indian Act*. Since quorum was achieved with a majority of all eligible voters attending the surrender meeting, the *Indian Act* required only that a majority of those present at the meeting vote in favour of the surrender.

Fifth, were all the voters habitually resident on, and interested in, the reserve? There is no evidence to suggest that any of the 17 voters on January 28, 1907, were ineligible by reason of non-residency.

Sixth, was the surrender duly certified? Section 49(3) of the 1906 *Indian Act* required that the surrender vote be certified on oath by the Superintendent General, or his duly authorized officer, and by "some of the chiefs or principal men present" at the surrender meeting. Was this requirement met? As described earlier, on the certificate of surrender, the preprinted word "Chief" was crossed out and the word "Indian" substituted so that Kahkanowenapew, an ordinary member of the Band, could certify the surrender on oath.

At first glance, these circumstances appear to be similar to those in *Apsassin,* where the Chiefs did not personally certify the surrender. Instead, they simply told the Commissioner for Oaths that they wished to surrender and he then swore the certificate. However, the difference in the case of the Kahkewistahaw surrender was that no Chief or principal man was present at either the surrender or the swearing of the certificate. As we will discuss below in the context of Canada's fiduciary obligations to First Nations, the deaths of Kahkewistahaw, Wasacase and Louison left the Band with a leadership void that had not been resolved by the time of the surrender. Instead, an ordinary member of the Band who had been present at the surrender swore the certificate. In our view, there was clearly a failure to comply with subsection 49(3) because there was no Chief or headman to attest to the propriety of the surrender process.

Finally, was the surrender accepted by the Governor in Council as stipulated by subsection 49(4)? We have already noted that the surrender was submitted to the Governor in Council on February 26, 1907, and approved on March 4 of that year. In a purely technical sense, the requirements of subsection 49(4) were met because the Band's assent was submitted to the Governor in Council and accepted. However, in light of the reasons of McLachlin J in *Apsassin*, fiduciary obligations may also be superimposed on the Crown, in addition to the technical requirements of subsection 49(4). We will return to the question of the Crown's fiduciary duties later in our report.

Mandatory versus Directory Surrender Requirements

Given our findings that the 1907 surrender failed to comply with the certification provisions in subsection 49(3) of the 1906 *Indian Act*, it is necessary to consider whether such non-compliance renders the 1907 surrender invalid. Obviously, if the provisions of section 49 of the *Indian Act* are mandatory rather than merely directory, any surrender that does not comply with one or more of them may be invalid for that reason alone. For guidance on how these provisions are to be interpreted, it is necessary to consider the relevant case authorities on point.

In the *Chippewas of Kettle and Stony Point* case, Killeen J concluded that failure to comply with section 49 would be fatal to the surrender in some cases but not in others. He stated:

> What, then, is the effect of s. 49(1)-(3)?
>
> Section 49(1) lays down, in my view, in explicit terms, a true condition precedent to the validity of any surrender and sale of Indian reserve lands. It makes this abundantly clear by saying that no such surrender "shall be valid or binding" unless its directions are followed.
>
> Bearing in mind the prophylactic principle at stake in the *Royal Proclamation*, as reinforced by ss. 48-50, it is simply impossible to argue that s. 49(1) does not lay down a mandatory precondition for the validity of any surrender. If the surrender in question has not followed the s. 49(1) procedure, it must be void *ab initio*. To suggest otherwise is to re-write history and the commands of the *Royal Proclamation* and the Indian Act.[172]

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[172] *Chippewas of Kettle and Stony Point v. Attorney General of Canada* (1995), 24 OR (3d) 654 at 685 (Ont. Ct GD).

The four essential criteria in subsection 49(1) are assent by the majority of male members over the age of 21 years; the assent given at a meeting or council called for the purpose of considering the surrender; the meeting called "according to the rules of the Band"; and the meeting conducted in the presence of the Superintendent General of Indian Affairs or his agent. We have already concluded that all of these criteria were satisfied.

With regard to the residency requirement in subsection 49(2), Killeen J stated:

> I may also say, here, that I am not persuaded that s. 49(2) contains a mandatory procedural requirement of the kind specified in s. 49(1). There is nothing in s. 49(2) itself to suggest that failure to comply with its directive would render the surrender invalid. In any event, I am entirely satisfied that s. 49(2) was complied with and that no one who voted at the meeting violated its prescription.[173]

As noted previously, the Commission reached the same conclusion on the facts of this case.

In relation to the certification provision, which we have found was not met in this case, Killeen J stated:

> I cannot agree with Mr. Vogel's contention that s. 49(3) contains a mandatory precondition to the validity of the surrender.
>
> It is true that s. 49(3) uses the phrase "shall be certified" but, considered in context, I believe this language to be directory and not mandatory.
>
> In order to get at the meaning and scope of this phrase, one must consider the object and purpose of s. 49(3). As it seems to me, its

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[173] *Chippewas of Kettle and Stony Point v. Attorney General of Canada* (1995), 24 OR (3d) 654 at 690 (Ont. Ct GD).

> purpose is clearly differentiated from the purpose of s. 49(1) or (2). These latter provisions establish the exact procedures to be followed in effectuating a valid surrender on the part of a given Indian band. On the other hand, s. 49(3) achieves what I would call an after-the-fact evidentiary purpose, namely, to provide sworn documentary proof that the requirements of s. 49(1) and (2) have been complied with in all respects.
>
> I cannot believe that an evidentiary or proof proviso aimed at providing future proof in sworn form that appropriate procedures for an assent to surrender have been followed can somehow have a nullifying effect on an assent to surrender that would otherwise be valid. Section 49(3) itself does not use the same language as s. 49(1) does – "no release or surrender of a reserve ... shall be valid or binding, unless" – and, absent such language, the context and purpose of s. 49(3) dictates that it be given a directory rather than mandatory effect.[174]

Subsequently, McLachlin J in *Apsassin* considered whether subsections 51(3) and (4) of the 1927 *Indian Act*, which are equivalent to subsections 49(3) and (4) of the 1906 *Indian Act*, are mandatory or merely directory:

> This raises the question of whether the ss. 51(3) and 51(4) are mandatory or merely directory. Addy J. and Stone J.A. below held that despite the use of the word "shall", the provisions were directory rather than mandatory, relying on *Montreal Street Railway Co.* v. *Normandin*, [1917] A.C. 170 (P.C.), which summarized the factors relevant to determining whether a statutory direction is mandatory or directory as follows (at p. 175):
>
>> When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have

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[174] *Chippewas of Kettle and Stony Point v. Attorney General of Canada* (1995), 24 OR (3d) 654 at 691-92 (Ont. Ct GD).

> > no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only. . . .
>
> Addy J. concluded that to read the provisions in a mandatory way would not promote the main object of the legislation, which is to ensure that the sale of the reserve is made pursuant to the wishes of the Band. Stone J.A. agreed. This Court has since held that the object of the statute, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory: *British Columbia (Attorney General)* v. *Canada*, [1994] 2 S.C.R. 41.
>
> The true object of ss. 51(3) and 51(4) of the Indian Act was to ensure that the surrender was validly assented to by the Band. The evidence, including the voter's list, in the possession of the DIA amply established valid assent. Moreover, to read the provisions as mandatory would work serious inconvenience, not only where the surrender is later challenged, but in any case where the provision was not fulfilled, as the Band would have to go through the process again of holding a meeting, assenting to the surrender, and certifying the assent. I therefore agree with the courts below that the "shall" in the provisions should not be considered mandatory. Failure to comply with s. 51 of the Indian Act therefore does not defeat the surrender.[175]

We conclude, on applying the foregoing reasoning to the facts of this case, that the failure to comply with section 49 of the 1906 *Indian Act* similarly does not "defeat the surrender" in this case. Although the certification affidavit was sworn by Kahkanowenapew and not by "some of the chiefs or principal men," it is apparent that the assent of the majority had already been given. The purpose of subsection 49(3) is merely to confirm satisfaction of the requirements of subsection

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[175] *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 42-43 (SCC), McLachlin J.

49(1) and (2), and in particular that majority assent of the Band members was given at an open meeting called for the purpose of discussing the surrender. We agree that invalidating the surrender on the basis of the failure to certify properly the majority assent already given would work a serious inconvenience and would not promote the object of ensuring that the surrender was validly assented to by the Band. We also conclude that this failure in fulfilling the technical surrender requirements of the *Indian Act* does not, in and of itself, give rise to an outstanding lawful obligation owed by Canada to the First Nation.[176]

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[176] The parties have also raised the issue of whether there are any technical requirements within Treaty 4 itself which would have required the Crown to obtain the consent of the Kahkewistahaw Band before securing the 1907 surrender. To the extent that the surrender requirements of the treaty may be inconsistent with sections 48 to 50 of the 1906 *Indian Act*, it is our view that the terms of the statute will prevail. As Cory J stated in *R.* v. *Horseman*, [1990] 3 CNLR 95 at 105 (SCC):

> In addition, although it might well be politically and morally unacceptable in today's climate to take such a step as that set out in the 1930 Agreement without consulationwith and oncurrence of the Native peoples affected, *nonetheless the power of the Federal Government to unilaterally make such a modification is unquestioned* and has not been challenged in this case.

We agree with Canada that, when the 1906 *Indian Act* was proclaimed, federal legislation could substantively affect or regulate treaty rights to the extent that the legislation evinced a clear intention to modify a treaty right. At the time of the surrender, there was no constitutional restraint to preclude Canada from enacting such legislation since s. 35 of the *Constitution Act, 1982*, which recognizes and affirms existing aboriginal and treaty rights, did not yet exist. However, we also concur with Canada's position that it is not necessary to find that there is any inconsistency between the 1906 *Indian Act* and Treaty 4 on the question of surrender requirements. The treaty does not establish a required level of consent or a means of expressing such consent. Accordingly, the statutory surrender requirements represented a reasonable expression of the consent required under the treaty and, to the extent that those statutory requirements were satisfied, it can be said that the treaty requirements were likewise met.

Effect of Valid Surrender

What, then, is the effect of the surrender, in the words of McLachlin J, not being "defeated"? The answer to this question has been considered more fully in the reasons of the Ontario Court of Appeal in *Chippewas of Kettle and Stony Point*. In that case, the Band surrendered land for sale to a purchaser named MacKenzie Crawford at a price of $85 per acre, plus a $15 "bonus" to be paid in two instalments to each eligible voter: $5 upon voting at the surrender meeting, and a further $10 in the event that the surrender received the Band's consent. Laskin JA described the rationale for the "bonus" in these terms:

> Crawford first submitted an offer to the Department of Indian Affairs to purchase the land for $85.00 per acre, cash. He then offered to pay an additional $15 cash "bonus" to each member of the Band eligible to vote on the surrender because, in his words, the Indians "all said they had to have some money right away" and "I am quite satisfied they needed a little money." At the meeting, Crawford and the Band discussed the sale price and the amount of money to be paid up front. The Indian agent was concerned about the propriety of paying a bonus. Crawford apparently offered to pay $100 per acre instead of $85 per acre plus the $15 bonus, but after discussion at the meeting, Crawford and the Band decided on the bonus arrangement. It is easy to see why. Under the statutory scheme, the maximum sum that could be distributed to the Band would be 50% of the sale proceeds after closing and even that 50% distribution would be reduced by the Band's debts. The voting members would, on the other hand, receive the entire direct payment. At the meeting, Crawford paid $5 to each voting member. About two and one-half months later he went to the reserve and paid the rest of the bonus.[177]

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[177] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, unreported, [1996] OJ No. 4188 (December 2, 1996) at 12-13 (Ont. CA).

After closing the sale some 28 months following the surrender, Crawford "flipped" the land for nearly three times the purchase price.

Contending that the "bonus" was no more than a bribe, the Band argued that payment of the "bonus" and indeed Crawford's attendance at the surrender meeting were both prohibited by the *Royal Proclamation* of 1763 and the *Indian Act*. The Band's third ground for challenging the validity of the surrender was the 28-month delay in closing the transaction. On Canada's preliminary application for summary judgment dismissing the Band's claim for declaratory relief, all three grounds were rejected by Killeen J of the Ontario Court's General Division on the basis that they did not represent genuine issues for trial.

The Court of Appeal upheld the decision of Killeen J and dismissed the appeal. Laskin JA acknowledged that the underlying philosophy of both the *Royal Proclamation* and the surrender provisions of the *Indian Act* was to prevent aboriginal peoples from being exploited by third party purchasers by inserting the Crown in a "protective and fiduciary role" as a buffer or intermediary between the parties. The statute also provided for public surrender meetings since, according to Laskin JA, "with dealings conducted in the open, frauds, abuses and misunderstandings were less likely to occur."[178] Nevertheless, the Court of Appeal unanimously held that neither Crawford's attendance at the surrender meeting, nor his offer to pay "bonus" money on the spot, violated the language or the rationale of the *Royal Proclamation* or the *Indian Act*. Laskin JA found that the Band not only intended to surrender its land but had pressed on several occasions for Crawford to move more quickly to close the sale. The Court concluded that the surrender, being unqualified and absolute, "extinguished the aboriginal interest in the surrendered land"[179] and was not subject to the oral understanding or condition that the sale would be completed reasonably quickly after the surrender vote, as the Band had claimed.

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[178] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, unreported, [1996] OJ No. 4188 (December 2, 1996) at 9-10 (Ont. CA).

Extinguishing the aboriginal interest in the surrendered land means that it is not open to the Kahkewistahaw Band to challenge the titles of the current registered owners of the surrendered lands, most, if not all, of whom by this late date must be *bona fide* third party purchasers for value. It must be kept in mind, however, that the appeal in *Chippewas of Kettle and Stony Point* arose from a motion by the Crown seeking summary judgment dismissing the Band's claim for a declaration that the 1927 surrender and the 1929 Crown patent in that case were void. Although the decision confirmed the surrender as well as the titles of those defendants who now own land surrendered by the Band in 1927, Killeen J also recognized that certain issues could not be disposed of summarily and remained to be decided at trial:

> Any finding of unconscionable conduct under the facts of this case *cannot affect the validity of the Order in Council* [approving the surrender]; *rather, such finding or findings must surely go to the Band's other claim for breach of fiduciary duty.*[180]

Similarly, the Court of Appeal concluded:

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[179] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, unreported, [1996] OJ No. 4188 (December 2, 1996) at 29 (Ont. CA).

[180] *Chippewas of Kettle and Stony Point v. Attorney General of Canada* (1995), 24 OR (3d) 654 at 698 (Ont. Ct GD).

> . . . what then of the cash payments, which, in the words of the motions judge, had "an odour of moral failure about them"? In my view, there is no evidence to suggest that these cash payments, in the words of McLachlin J., vitiated the "true intent" or the "free and informed consent" of the Band or, in the words of Gonthier J., "made it unsafe to rely on the Band's understanding and intention." In keeping with Apsassin, the decision of the Band to sell should be honoured. Therefore, like Killeen J., I am satisfied that there is no genuine issue for trial on whether the cash payments invalidated the surrender. I would dismiss the Band's second ground of appeal.
>
> *I add, however, that the cash payments or alleged "bribe" and consequent exploitation or "tainted dealings" may afford grounds for the Band to make out a case of breach of fiduciary duty against the Crown. As the parties have recognized, this is an issue for trial. The same may be said of the Band's contention that the sale to Crawford was improvident, he having immediately "flipped" the land for nearly three times the purchase price.* In discussing whether the Crown had a fiduciary duty to prevent the surrender in Apsassin, McLachlin J. wrote at p. 371:
>
>> It follows that under the Indian Act, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.
>
> This, too, is an issue for trial.[181]

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[181] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, unreported, [1996] OJ No. 4188 (December 2, 1996) at 24-25 (Ont. CA). Emphasis added. The references to "improvidence" in this passage relate to the issue of the Crown's fiduciary obligations arising out of the Governor in Council's acceptance of a surrender under subsection 49(4) . This issue will be dealt with later in this report.

Our mandate under the Specific Claims Policy is to determine whether an outstanding lawful obligation is owed by Canada to the Kahkewistahaw First Nation. Although we have concluded that the surrender was technically valid, an outstanding lawful obligation may nevertheless be grounded in Canada's breach of its fiduciary duties to the First Nation. We now turn to our analysis of the fiduciary duties, if any, owed by Canada to Kahkewistahaw on the facts of this case.

ISSUE 2 CANADA'S PRE-SURRENDER FIDUCIARY OBLIGATIONS

The Supreme Court of Canada has, in recent years, addressed in a number of cases the categories of relationships that may be considered "fiduciary" in nature, and the content of the duties that arise given a particular fiduciary relationship and the facts of the case in question. In this portion of our report, we will review the leading cases – most notably *Apsassin* and the consideration of that case by the Ontario courts in *Chippewas of Kettle and Stony Point* – dealing with the fiduciary obligations of the Crown in the context of the surrender of all or a portion of a band's reserve. We will also review the approaches which have been used by the courts for identifying whether a fiduciary obligation exists in given circumstances – in particular, where the band's understanding of the terms of the surrender are inadequate, where the conduct of the Crown has tainted the dealings in a manner that makes it unsafe to rely on the band's understanding and intention, where the band has abnegated its decision-making authority in favour of the Crown in relation to the surrender, or where the surrender is so foolish or improvident as to be considered exploitative. In applying the jurisprudence to the facts of this case, we will also consider whether the Crown owed and failed to satisfy any fiduciary duties to the Kahkewistahaw Band and, if so, whether Canada may be said to owe the First Nation an outstanding lawful obligation.

The *Guerin* Case

We have already alluded to certain fiduciary obligations that the Supreme Court of Canada has determined are owing by Canada to First Nations and are superimposed on the statutory surrender regime. In considering these obligations, we will focus primarily on the recent decision of the Supreme Court of Canada in *Apsassin* as the leading authority on the Crown's fiduciary duties to a band *prior to* a surrender of Indian reserve lands. Before embarking on our analysis of *Apsassin*, however, it is appropriate to review briefly the landmark 1984 decision of the Supreme Court of Canada in *Guerin* v. *The Queen*.[182] Although the *Guerin* case dealt with the fiduciary obligations of the Crown with respect to the sale or lease of Indian reserve lands *after* a band has surrendered its land, the case nevertheless provides a useful starting point because it is the first decision in which the Supreme Court of Canada acknowledged that the Crown stands in a fiduciary relationship with aboriginal peoples.

In *Guerin*, the Musqueam Band surrendered 162 acres of reserve land to the Crown in 1957 for lease to a golf club on the understanding that the lease would contain the terms and conditions that were presented to and agreed upon by the Band Council. The surrender document that was subsequently executed gave the land to the Crown "in trust to lease the same" on such terms as it deemed most conducive to the welfare of the Band. The Band later discovered that the terms of the lease obtained by the Crown were significantly different from what the Band had agreed to and were less favourable.

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[182] *Guerin v. The Queen*, [1984] 2 SCR 335, [1985] 1 CNLR 120, [1984] 6 WWR 481, 13 DLR (4th) 321.

All eight members of the Court found that Canada had breached its duty to the Band. On the nature of the Crown's fiduciary relationship, Dickson J (as he then was) for the majority of the Court stated:

> Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.
>
> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest J. Weinrib maintains in his article "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion". Earlier, at p. 4, he puts the point in the following way:
>
>> [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.
>
> I make no comment upon whether this descripton is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered

> becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct. . . .
>
> . . . When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the band to explain what had occurred and seek the band's counsel on how to proceed. The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. *Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.*[183]

Justice Dickson held that the *Indian Act* surrender provisions interposed the Crown between Indians and settlers with respect to the alienation of reserve lands. He described the source of the fiduciary relationship in these terms:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, Native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.
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> An Indian band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried

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[183] *Guerin* v. *The Queen*, [1984] 2 SCR 335, 55 NR 161, 13 DLR (4th) 321, [1985] 1 CNLR 120 at 136-37 and 140, Dickson J. Emphasis added.

> out after a surrender has taken place, with the Crown then acting on the band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763 [see RSC 1970, App. I]. It is still recognized in the surrender provisions of the *Indian Act*. *The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians*.[184]

The *Guerin* case is instructive for two reasons: first, it determined that the relationship between the Crown and First Nations is fiduciary in nature; second, it clearly established the principle that an enforceable fiduciary obligation will arise in relation to the sale or lease of reserve land by the Crown on behalf of, and for the benefit of, a band to a third party *following* the surrender of reserve land to the Crown in trust. However, the Supreme Court of Canada was not called upon in *Guerin* to address the question whether the Crown owed any fiduciary duties to the band *prior to* the surrender. That issue was not specifically addressed until *Apsassin* appeared on the Court's docket.

The *Apsassin* Case

In *Apsassin*, the Beaver Indian Band[185] entered into a treaty with the Crown in 1916. Under the terms of Treaty 8, Canada set aside 28 square miles of land as Indian Reserve 172 for the Band in the Peace River District of British Columbia. The reserve contained good agricultural land, but the Band did not use it for farming. It was used only as a summer campground, since the Band made a living from trapping and hunting further north during the winter. In 1940, the Band surrendered the mineral rights in its reserve to the Crown, in trust, to lease for the Band's benefit. The Band was approached again in 1945, following the Second World War, to explore surrender of the reserve so that the land could be made available for returning veterans interested in taking up agriculture. After a period of negotiation between the Department of Indian Affairs and the Director, *Veteran's Land Act* (DVLA), the entire reserve was surrendered in 1945 for $70,000. In 1950, some of the money from the sale was used by the Department to purchase other reserve lands closer to the Band's traplines further north. Between 1948 and 1956, all of the surrendered lands, including the mineral rights, were sold to veterans. Following disposition, the lands were discovered to contain oil and gas deposits that have generated an estimated $300 million in revenues. The mineral rights were considered to have been "inadvertently" conveyed to the veterans instead of being retained for the benefit of the Band, and, although the Department had powers under section 64 of the *Indian Act* to cancel the transfer and reacquire the mineral rights, it did not do so. On discovering these facts, the Band sued for breach of fiduciary duty, claiming damages from the Crown for allowing the Band to make an improvident surrender of the reserve and for disposing of the land below value.

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[184] *Guerin* v. *The Queen*, [1984] 2 SCR 335, 55 NR 161, 13 DLR (4th) 321, [1985] 1 CNLR 120 at 131-32, Dickson J. Emphasis added.

[185] The Beaver Indian Band was eventually split into two bands, which became known as the Blueberry River Band and the Doig River Band.

At trial,[186] Addy J dismissed all but one of the Band's claims. He found that no fiduciary duty existed prior to or concerning the surrender, and that the Crown had not breached its post-surrender fiduciary obligation with respect to the mineral rights, since those rights were not known to be valuable at the time of disposition.

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[186] *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1988] 14 FTR 161, 1 CNLR 73 (TD).

He also found, however, that the Department had breached a post-surrender fiduciary duty by not seeking a higher price for the surface rights.

The Federal Court of Appeal[187] dismissed the Band's appeal and the Crown's cross-appeal. However, the majority rejected the trial judge's conclusion that no fiduciary duty arose prior to the surrender. Rather, the Federal Court of Appeal held that the combination of the particular facts of the case and the *Indian Act* imposed a fiduciary obligation on the Crown. The specific nature of the obligation was not to prevent the surrender or to substitute the Crown's own decision for that of the Band, but rather to ensure that the Band was properly advised of the circumstances concerning the surrender and of the options open to it, since the Crown itself had sought the surrender of the lands to make them available to returning soldiers.

Although the majority concluded that the Crown owed a pre-surrender fiduciary duty to the Band, Stone JA (Marceau JA concurring) agreed with Justice Addy's disposition of the case. Stone JA held that the Crown had discharged its duty, since the Band had been fully informed of "the consequences of a surrender," was fully aware that it was forever giving up all rights to the reserve, and gave its "full and informed consent to the surrender."[188] Stone JA also found that the Crown did not breach a post-surrender fiduciary obligation with respect to the disposition of the mineral rights since they were considered to be of minimal value at the time of the surrender. Once the rights had been conveyed to the DVLA, any postonce it had been discovered. Although McLachlin J wrote the minority judgment on the effect of the 1945 surrender on the earlier surrender of the mineral rights, the entire Court supported her analysis of the Crown's fiduciary obligations in the pre-surrender context.[190] However, even Justice Gonthier's majority decision, in which he concluded that the Beaver Indian Band had clearly intended to surrender its reserve, spoke of the department's fiduciary duty "to put the Band's interests first."[191] In his reasons, Gonthier J alluded to a "tainted dealings" approach under which the conduct of the Crown must be reviewed to determine whether there has been a breach of fiduciary obligation.

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[187] *Apsassin v. Canada*, [1993] 3 FC 28, 100 DLR (4th) 504, 151 NR 241, [1993] 2 CNLR 20 (Fed. CA).

[188] *Apsassin v. Canada*, [1993] 3 FC 28, 100 DLR (4th) 504, 151 NR 241, [1993] 2 CNLR 20 at 46 (Fed. CA).

Pre-surrender Fiduciary Duties of the Crown

Where a Band's Understanding Is Inadequate or the Dealings Are Tainted

In addressing how the Beaver Indian Band's surrender for sale or lease of both mineral and surface rights in 1945 had expanded upon and subsumed the earlier 1940 surrender of mineral rights for lease only, Gonthier J stated:

> I should also add that *I would be reluctant to give effect to this surrender variation if I thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention*. However, neither of these situations arises here. As the trial judge found, the consequences of the 1945 surrender were fully explained to the Indians by the local agent of the DIA [Department of Indian Affairs] during the negotiations. There was also substantial compliance with the technical

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[190] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 28-29 (SCC).

[191] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 34 (SCC).

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In short, Justice Gonthier would have been reluctant to permit the variation of the 1940 surrender in two situations: first, if the Band's understanding of the terms of the surrender had been inadequate, and, second, "if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention."

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[192] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 34 (SCC). Emphasis added.

With regard to the first of these concerns, we note the conclusion of Addy J at trial in *Apsassin* that, "although [the members of the Beaver Indian Band] would not have understood and probably would have been incapable of understanding the precise nature of the legal interest they were surrendering, they did in fact understand that by the surrender they were giving up forever all rights to I.R. 172."[193] We believe that the same inference can likely be made in the present case. However, the long-standing nature of this grievance points to the conclusion that, although the Band members may have known from the outset that their rights had been absolutely alienated, they were not happy with that result and sought to change it.

Even if the Kahkewistahaw people *understood* that they were giving up all of their rights in the surrendered lands and *intended* to do so, a larger problem for Canada is whether the conduct of the Crown leading up to the surrender somehow tainted the dealings in a manner that made it unsafe to rely on the Band's understanding and intention. The view that "tainted dealings" might form a separate basis for a claim that the Crown has breached its fiduciary obligations to a band has recently been reiterated by the decision of the Ontario Court of Appeal in the *Chippewas of Kettle and Stony Point* case. There, after agreeing with Killeen J that certain cash payments in that case would not operate to invalidate the surrender, Laskin JA continued:

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[193] *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1988] 14 FTR 161, 1 CNLR 73 at 129-30 (TD).

> I add, however, that the cash payments or alleged "bribe" and consequent exploitation or "tainted dealings" may afford grounds for the Band to make out a case of breach of fiduciary duty against the Crown. As the parties have recognized, this is an issue for trial.[194]

In *Apsassin*, while discussing the technical surrender provisions of the *Indian Act*, Gonthier J highlighted the importance of identifying a band's true intention:

> An intention-based approach offers a significant advantage, in my view. As McLachlin J. observes, the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. . . . In my view, when determining the legal effect of dealings between Aboriginal peoples and the Crown relating to reserve lands, the sui generis nature of Aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings.[195]

In our view, the crux of Justice Gonthier's analysis is that the autonomy of Indian bands is to be respected and honoured. In this respect he is in full agreement with McLachlin J. If, however, a band's decision-making power has been undermined or "tainted" in a manner that makes it "unsafe to rely on the Band's understanding and intention," then the band's autonomy has likewise been compromised. Although

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[194] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, unreported, [1996] OJ No. 4188 (December 2, 1996) at 24-25 (Ont. CA).

[195] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 31 (SCC).

Gonthier J did not define what he meant by "tainted dealings," it is clear that, like McLachlin J, he placed considerable reliance on the following findings of Addy J at trial:

> 1. That the plaintiffs had known for some considerable time that an absolute surrender of I.R. 172 was being contemplated;
> 2. That they had discussed the matter previously on at least three formal meetings [sic] where representatives of the Department were present;
> 3. That, contrary to what has been claimed by the plaintiffs, it would be nothing short of ludicrous to conclude that the Indians would not also have discussed it between themselves on many occasions in an informal manner, in their various family and hunting groups;
> 4. That, at the surrender meeting itself, the matter was fully discussed both between the Indians and with the departmental representatives previous to the signing of the actual surrender;
> 5. That [Crown representatives had not] attempted to influence the plaintiffs either previously or during the surrender meeting but that, on the contrary, the matter seems to have been dealt with most conscientiously by the departmental representatives concerned;
> 6. That Mr. Grew [the local Indian Agent] fully explained to the Indians the consequences of a surrender;
> 7. That, although they would not have understood and probably would have been incapable of understanding the precise nature of the legal interest they were surrendering, they did in fact understand that by the surrender they were giving up forever all rights to I.R. 172, in return for the money which would be deposited to their credit once the reserve was sold and with their being furnished with alternate sites near their trapping lines to be purchased with the proceeds;
> 8. That the said alternate sites had already been chosen by them, after mature consideration.[196]

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[196] *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1988] 14 FTR 161, 1 CNLR 73 at 129-30 (TD).

In particular, Gonthier J found that Crown officials had fully explained the consequences of the surrender, had not attempted to influence the Band's decision, and had acted conscientiously and in the best interests of the Band throughout the entire process.

In Kahkewistahaw's case, it is our view that, unlike Indian Agent Grew in *Apsassin*, Graham did *not* act conscientiously and that he clearly intended to influence the outcome of the surrender vote. Rather than assisting the Crooked Lake Bands in choosing courses of action best suited to their needs, Graham expressed the goal of securing surrenders to "free up" land for settlement and appease the growing pressure from adjoining communities. He expressly stated that bringing cash inducements would assist him greatly in achieving his goal, and he arrived in the middle of the harsh prairie winter with cash in hand. At that time, the Kahkewistahaw Band was particularly vulnerable because its members were poor, starving, illiterate, and, as will be discussed at greater length below, without effective leadership. The surrender meeting in fact took place in the context of a promise that each member of the Band would immediately receive $94, or one-twentieth of the estimated sale price of the land. Graham made it clear that he intended to see that the Band members did not receive independent legal or other expert advice, and there is evidence that he threatened that they would not receive further government assistance unless they agreed to the surrender. During the Commission's community session at Kahkewistahaw, elder Mervin Bob stated that the Band was very much influenced by the offer of instant cash and the threat of future assistance being withheld:

> The Indian agent, farm instructor would put money on the table and say it's - and say that if you guys don't sign this paper you're going

> to get no more help. Just like putting a bunch of candies in front of a child. Just like putting a bunch of candies in front of a kid saying if you don't do this, if you don't do that, you're not going to get this. That's the way we were treated and this is the what I was asking to tell, to tell you's.[197]

Unlike the situation in *Apsassin*, there is no evidence in the present case that any alternative sites or arrangements in lieu of the surrendered lands were considered or even available. To the contrary, the evidence that we do have indicates that it was not the Crown's intention to act conscientiously on the Band's behalf, and that the Crown failed to satisfy its fiduciary obligation to the Band when faced with conflicting interests. We recognize that the Crown was and is constantly faced with conflicting interests since it has the dual and concurrent responsibilities of representing the interests of both the general public and Indians. However, the *fact* that the Crown has conflicting duties in a given case does not necessarily mean that the Crown has breached its fiduciary obligations to the First Nation involved. Rather it is the manner in which the Crown *manages* that conflict that determines whether the Crown has fulfilled its fiduciary obligations. As McLachlin J stated in *Apsassin*:

> The trial judge was correct in finding that a fiduciary involved in self-dealing, i.e. in a conflict of interest, bears the onus of demonstrating that its personal interest did not benefit from its fiduciary powers: J.C. Shepherd, *The Law of Fiduciaries* (1981), at pp. 157-59; and *A.H. Oosterhoff: Text, Cases and Commentary on the Law of Trusts* (4th ed. 1992). The Crown, facing conflicting political pressures in favour of preserving the land for the Band on the one hand, and making it

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[197] ICC Transcript, May 3, 1995, p. 102 (Mervin Bob).

> available for distribution to veterans on the other, may be argued to have been in a position of conflict of interest.[198]

We find that the Crown faced identical conflicting political pressures in its dealings with Kahkewistahaw, but has failed in the present case to demonstrate that it did not benefit – at least politically, if not financially – from inducing the 1907 surrender.

It is, in our view, nonsense to suggest that the Kahkewistahaw Band acted autonomously with respect to this surrender or that the decision represented its true intention. The vote that took place on January 28, 1907, was timed and staged to obtain a technical approval, and it represented the culmination of attempts by the surrounding non-aboriginal interests, aided and abetted by the Government of Canada, to procure a surrender. Those attempts began in 1885 and were brought to fruition in 1907, some 22 years later, following a continual barrage of local and department pressure involving virtually every figure of authority in the local community and, ultimately, those in positions of departmental authority and responsibility. During that entire 22-year period, the lone voices speaking on behalf of protecting the Kahkewistahaw people were Indian Agent McDonald,

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[198] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 45 (SCC). This excerpt from the *Apsassin* case raises the question of which party bears the burden of proof in the event that the evidence is inconclusive on any of the issues before the Commission. The general principle with respect to the burden of proof and onus is that the First Nation, as the claimant, bears the burden of proving that the Crown has breached its lawful obligations. In our view, the facts in this case are so clear that the result does not turn on the question of which party bears the burden of proof. Even if the onus does rest with the First Nation, we are satisfied that, on a balance of probabilities, that burden has been met. The First Nation having made out its case on a *prima facie* basis, Canada has not refuted the claim by tendering cogent evidence to the contrary. This is particularly so in those instances in which we have noted that Canada, as a fiduciary in a position of self-dealing or conflict of interest, must demonstrate that it did not benefit from its beneficiary powers.

Commissioner Laird, and Assistant Indian Commissioner McKenna. By 1907, it appears that, through retirement or for other reasons, all three of those voices had become silent. It is remarkable that the Kahkewistahaw Band maintained its position in the face of such pressure over those 22 years. It is to be remembered that the Band rejected Graham's surrender proposal by a vote of 14 to 5 at the meeting of January 23, and that it was only as a result of the developments in the following days that the Band reversed its position. To suggest that the Band would, after 22 years of adamant opposition, reverse itself and adopt a position so clearly detrimental to its best interests over the course of five days, between January 23 and January 28, 1907, in the absence of "tainted dealings" by the Government of Canada, is absurd.

This is not a case where a band had no interest in putting reserve land to the use for which it was best suited, as was the situation in *Apsassin*. Rather, this is a situation where the Band's efforts at developing agricultural self-sufficiency, although impeded by various policies and circumstances, had gained a foothold and the Band was becoming increasingly able to put the land to good use. The record discloses that, although only a few of the Crown's agents had considered whether this surrender would be in the best interests of the Band, they invariably concluded that it would not. In spite of this advice, the surrender was obtained. Arguably, the First Nation has demonstrated that the Crown was in a conflict of interest, but, for its part, the Crown has failed to establish that the surrender was intended to benefit anyone other than settlers and the Crown itself. This conclusion is to be contrasted with the circumstances in *Apsassin*, in which the Court found that, in spite of the Crown's potential conflict, the sale of the land to the DVLA was also in the Beaver Indian Band's best interests. In this sense, the sale of the land to the Crown was of mutual benefit to the Band and to local interests, so the Crown was not in breach of its fiduciary duty. In the present case, the evidence indicates not only that Canada failed in its duty to protect the Band from sharp and predatory practices in dealing with its reserve lands but that Canada itself initiated the "tainted dealings."

Where a Band Has Ceded or Abnegated Its Power to Decide

We have already mentioned that McLachlin J wrote the minority judgment in *Apsassin*, but that the entire Court nevertheless supported her analysis regarding the Crown's fiduciary obligations in the pre-surrender context. In considering whether the Crown owes a fiduciary obligation to a band in the pre-surrender context, and, if so, the content of that obligation, McLachlin J drew on several Supreme Court decisions dealing with the law of fiduciaries in the private law context:

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 SCR 99 [[1988] 1 CNLR 152 (abridged version)]; *Norberg v. Wynrib*, [1992] 2 SCR 226; and *Hodgkinson v. Simms*, [1994] 3 SCR 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (*or more often finds himself in the situation where someone else has ceded for him*) his power over a matter to another person. The person who has ceded power *trusts* the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.[199]

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[199] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 40-41 (SCC). Emphasis added.

On the facts in *Apsassin*, McLachlin J found that "the evidence supports the view that *the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences, in relation to the surrender* of the Fort St. John reserve and the acquisition of new reserves which would better suit its life of trapping and hunting. *It does not support the contention that the band abnegated or entrusted its power of decision over the surrender of the reserve to the Crown.*"[200] Because the Band had not abnegated or entrusted its decision-making power over the surrender to the Crown, McLachlin J held that "the evidence [did] not support the existence of a fiduciary duty on the Crown prior to the surrender of the reserve by the Band."[201]

Justice McLachlin's analysis on what constitutes a cession or abnegation of decision-making power is very brief, no doubt because the facts before her demonstrated that the Beaver Indian Band had made a fully informed decision to surrender its reserve lands and that, at the time, the decision appeared eminently reasonable. In our view, it is not clear from her reasons whether she merely reached an evidentiary conclusion when she found that the Band had not ceded or abnegated its decision-making power to or in favour of the Crown, or whether she intended to state that, as a principle of law, a fiduciary obligation arises only when a band actually takes no part in the decision-making process at all. She had more to say on the issue in the *Norberg* case, in which she concluded in a minority judgment that an abnegation of decision-making power had occurred in the context of a doctor-patient relationship:

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[200] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 41 (SCC). Emphasis added.

[201] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 41 (SCC).

> As we have seen, an imbalance of power is not enough to establish a fiduciary relationship. It is a necessary but not sufficient condition. There must also be the potential for interference with a legal interest or a non-legal interest of "vital and substantial 'practical' interest." And I would add this. Inherent in the notion of fiduciary duty, inherent in the judgments of this court in *Guerin* and *Canson* [*Enterprises Ltd.* v. *Boughton & Co.*, [1991] 3 SCR 534], supra, is the requirement that the fiduciary have assumed or undertaken to "look after" the interest of the beneficiary. As I put it in *Canson* at p. 543 [SCR], quoting from this court's decision in *Canadian Aero Service Ltd.* v. *O'Malley*, [[1974] SCR 592,] supra, at p. 606 [SCR], "the freedom of the fiduciary is diminished by the nature of the obligation he or she has undertaken – an obligation which 'betokens loyalty, good faith and avoidance of a conflict of duty and self-interest'." It is not easy to bring relationships within this rubric. Generally people are deemed by the law to be motivated in their relationships by mutual self-interest. The duties of trust are special, confined to the exceptional case where one person assumes the power which would normally reside with the other and undertakes to exercise that power solely for the other's benefit. It is as though the fiduciary has taken the power which rightfully belongs to the beneficiary on the condition that the fiduciary exercise the power entrusted exclusively for the good of the beneficiary. Thus the trustee of an estate takes the financial power that would normally reside with the beneficiaries and must exercise those powers in their stead and for their exclusive benefit. Similarly, a physician takes the power which a patient normally has over her body, and which she cedes to him for purposes of treatment. The physician is pledged by the nature of his calling to use the power the patient cedes to him exclusively for her benefit. If he breaks that pledge, he is liable.[202]

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[202] *Norberg* v. *Wynrib*, [1992] 4 WWR 577 at 622-23 (SCC), McLachlin J.

The question of what is required to cede or abnegate decision-making power to or in favour of a fiduciary has also been considered by the Supreme Court of Canada in *Hodgkinson*. In that case, the Court dealt with an action by an unsophisticated investor against his accountant, who had recommended certain tax shelters in which, unknown to the investor, the accountant had a personal interest. La Forest J stated:

> It is important . . . to add further precision about the nature of reliance, particularly as it applies in the advisory context. Reliance in this context does not require a wholesale substitution of decision-making power from the investor to the advisor. This is simply too restrictive. It completely ignores the peculiar potential for overriding influence in the professional advisor and the strong policy reasons, to which I have previously referred, favouring the law's intervention by means of its jurisdiction over fiduciary duties to foster the fair and proper functioning of the investment market, an important social and economic activity that cannot really be regulated in other ways. As I see it, the reality of the situation must be looked at to see if the decision is effectively that of the advisor, an exercise that involves a close examination of the facts.[203]

Both *Norberg* and *Hodgkinson* suggest that decision-making authority may be ceded or abnegated even where, in a strictly technical sense, the beneficiary makes the decision. Neither case deals with the fiduciary relationship between the federal government and an Indian band, however, and therefore *Apsassin* must be considered the leading authority on the question of the Crown's pre-surrender fiduciary obligations. In reviewing that case, we cannot imagine that McLachlin J intended to say that the mere fact that a vote has been conducted in accordance with the surrender provisions of the *Indian Act* precludes a finding that a band has ceded or abnegated its decision-making power. If that is the test, it is difficult to conceive of any circumstances in which a cession or abnegation might be found to exist.

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[203] *Hodgkinson* v. *Simms*, [1994] 9 WWR 609 at 645 (SCC), La Forest J. Emphasis added.

We conclude that, when considering the Crown's fiduciary obligations to a band, it is necessary to go behind the surrender decision to determine whether decision-making power has been ceded to or abnegated in favour of the Crown. In our view, a surrender decision which, on its face, has been made by a band may nevertheless be said to have been ceded or abnegated. The mere fact that the band has technically "ratified" what was, in effect, the Crown's decision by voting in favour of it at a properly constituted surrender meeting should not change the conclusion that the decision was, in reality, made by the Crown. Unless the upshot of Justice McLachlin's analysis is that the power to make a decision is ceded or abnegated *only* when a band has completely relinquished that power in *form* as well as in *substance*, we do not consider the fact of a band's majority vote in favour of a surrender as being determinative of whether a cession or abnegation has occurred. Moreover, if the test is anything *less* than complete relinquishment in form and substance, it is our view that the test has been met on the facts of this case – the Band's decision-making power with regard to the surrender was, in effect, ceded to or abnegated in favour of the Crown.

In light of the role undertaken by the Crown to "look after" the interests of bands like Kahkewistahaw, and based on the relationship that had developed between Canada and Kahkewistahaw in the 33 years between the signing of Treaty 4 and the 1907 surrender, we believe it would have been reasonable for the members of the Band to expect that the Crown would deal with them on the basis of the "loyalty, good faith and avoidance of a conflict of duty and self-interest" referred to by McLachlin J. In addressing the issue of "tainted dealings," we have already reviewed at considerable length the facts which have led us to conclude that, in Kahkewistahaw's case, the Crown's motives and methods in securing the surrender were deserving of reproach. We find those same facts equally applicable in our conclusion that the Crown did not meet the standard required of it in deciding the issue ceded to or abnegated in favour of it (or *by* it).

In determining whether the Band's decision-making power was ceded to or abnegated in favour of the Crown, it is particularly important to consider the state of the Band's leadership at the time and to examine the First Nation's contention that a leadership vacuum contributed significantly to that cession or abnegation. In particular, the First Nation noted the absence of leadership following the death of Chief Kahkewistahaw and his two headmen, Wasacase and Louison, shortly before the surrender was obtained. The First Nation also relied on a report entitled *Report on Governance - Kahkewistahaw,* in which Professor J.R. Miller emphasized the important role of the Chief in the traditional decision-making process of the Band:

> A chief relied upon a council of adult males for advice on matters on which he had to decide a position, and within that council the more aged a councillor was the greater weight his advice would carry. Decision-making was conducted by a process that emphasized consultation and consensus, not mechanical head-counting or a requirement that "fifty percent plus one" person support a particular option. When the chief had explained the issue on which he sought advice to his council, they would offer their views, beginning with the youngest and ending with the eldest. Councillors probably would have discussed the matter with other members of the community, including female relatives, who were not members of the chief's council. Most adult people in the community would be consulted in one fashion or another, but everyone's opinion did not have the same weight. The views of those with the experience that age brought were accorded

> more weight than others. *After his councillors had voiced their considered views, the chief would decide the course of action to be followed.*[204]

Professor Miller also notes that, at the time of the surrender and for some time afterwards, "the Kahkewistahaw people maintained their traditional, largely hereditary, political leadership."[205]

We are obliged to acknowledge the enduring and powerful influence that Chief Kahkewistahaw exercised over the affairs of the Band that now bears his name. It was Chief Kahkewistahaw who led his people into a treaty relationship with Canada and kept them out of the Riel Rebellion in 1885. It was also Chief Kahkewistahaw who convinced his people to settle on the reserve that is now the subject of this inquiry and to take up agriculture to adapt to the new economic and social realities they faced. More to the point, we cannot forget the force of his convictions when he reminded the Crown of its treaty promises and spoke out against the proposed surrender of his reserve in 1902. Clearly, Chief Kahkewistahaw was a prominent leader with the ability to galvanize his people against the relinquishment of the land they were promised under the terms of Treaty 4.

Since the surrender was taken at a time when the Band had no recognized Chief or headmen and its members were not allowed to elect new representatives or to seek independent advice, serious questions arise whether the Crown took unfair advantage of the Band at a time when a leadership void existed. Joe Louison was not elected as the new Chief until 1911, but it is important to note that he voted against the surrender on January 28, 1907. Since a Chief played a persuasive role among his people when it was necessary to make decisions of such importance, the vote might have had a different outcome if Joe Louison had been elected Chief before the surrender. In our view, had the Crown been interested in a fair and unbiased decision-making process, it would have waited until the Band had a Chief and headmen before placing a decision of such importance before the voting members.

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[204] J.R. Miller, *Report on Governance - Kahkewistahaw*, ICC Exhibit 7, p. 2. Emphasis added.

[205] J.R. Miller, *Report on Governance - Kahkewistahaw*, ICC Exhibit 7, p. 9.

In short, as long as Chief Kahkewistahaw was alive, the surrender had been repeatedly rejected. The evidence does not support a finding that the Band's circumstances had changed significantly since before Kahkewistahaw's death, nor is there evidence that a new leader had emerged whose different vision of the Band's future led to the surrender being considered in a new light. The fact that it was necessary to call upon Kahkanowenapew to swear the certification affidavit refutes any such contention. We are driven to the conclusion that Graham knew the Band to be vulnerable and without leadership, and expressly chose to press his advantage.

We find the similar circumstances at Ochapowace to be telling. While that Band had its own leaders, it was able to resist Graham's tactics and to refuse the surrender he so ardently pursued. Later, when Ochapowace too was without leadership, the long-sought surrender was obtained by Graham, as he knew it would be. To say that this was mere coincidence would, in light of what we now know of departmental policy and practice and of Graham's own views, strain credibility. In conclusion, we have no hesitation in finding, on the facts of this case, that the Band ceded its decision-making power to the Crown, and that the Crown failed to meet its fiduciary duty to exercise that power conscientiously and without influencing the outcome of the surrender vote.

In closing on this issue, we note that, from the reasons of the Federal Court of Appeal in *Apsassin*, it might appear that, if Kahkewistahaw did not abnegate its decision-making power in favour of the Crown, the Crown nevertheless had a positive but lesser duty to provide the Band with "information as to its options and their foreseeable consequences." In the opinion of the Federal Court of Appeal in *Apsassin*, a duty to inform and advise exists and was fulfilled in relation to the Beaver Indian Band. On the further appeal, McLachlin J held that "the evidence supports the view that the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences, in relation to the surrender of the Fort St. John reserve and the acquisition of new reserves which would better suit its life of trapping and hunting."[206] Nevertheless, she concluded on the facts of that case that no pre-surrender fiduciary obligation existed. It is not clear from Justice McLachlin's reasons whether she meant that the Crown was duty-bound to inform and advise the Beaver Indian Band prior to the surrender, or whether she merely intended to acknowledge that such information and advice had in fact been provided to that Band. In the end, she was not required to decide that issue. Similarly, in the present case, we believe that it is unnecessary for us to decide whether such a duty exists, for we are prepared to conclude that the Kahkewistahaw Band effectively ceded its decision-making power regarding the 1907 surrender to the Crown and that the Crown procured the surrender through its own "tainted dealings."

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[206] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 41 (SCC), McLachlin J.

Duty of the Crown to Prevent the Surrender

The next question that the Commission must address is whether, on the facts of this case, the fiduciary obligation grafted by the Supreme Court of Canada onto subsection 49(4) of the 1906 *Indian Act* required the Crown to prevent the surrender of the reserve.

In *Apsassin*, the Beaver Indian Band had argued that the paternalistic scheme of the *Indian Act* – which vests title in the Crown on behalf of a band – imposed a duty on the Crown to protect Indians from making foolish decisions with respect to the alienation of their land. In essence, the argument was that the Crown should not have allowed the Beaver Indian Band to surrender its reserve, because this was not in the Band's long-term best interests. Conversely, the Crown asserted that bands should be treated as independent agents with respect to their lands. McLachlin J dealt with the issue in these terms:

> The first real issue is whether the *Indian Act* imposed a duty on the Crown to refuse the Band's surrender of its reserve. The answer to this is found in *Guerin* v. *The Queen*, . . . where the majority of this Court, *per* Dickson J. (as he then was), held that the duty on the Crown with respect to surrender of Indian lands was founded on preventing exploitative bargains. . . .
>
> *My view is that the Indian Act's provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection.* The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. *The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation.* As Dickson J. characterized it in *Guerin* [p. 136 CNLR]:
>
> > The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective

> purchasers or lessees of their land, so as to prevent the Indians from being exploited.
>
> *It follows that under the Indian Act, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains. . . .*
>
> The measure of control which the Act permitted the Band to exercise over the surrender of the reserve negates the contention that *absent exploitation*, the Act imposed a fiduciary obligation on the Crown with respect to the surrender of the reserve.[207]

Gonthier J concurred that "the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured."[208]

On the facts in *Apsassin*, Addy J had found that the decision to surrender the reserve made good sense when viewed from the perspective of the Beaver Indian Band at the time of the surrender. McLachlin J therefore concluded that the Governor in Council was not obliged to withhold consent, because the evidence did not establish that the surrender was "foolish, improvident or amounted to exploitation."

The question now before the Commission is whether the 1907 surrender by the Kahkewistahaw Band was so foolish, improvident, and exploitative as to give rise to a duty on Canada's part under section 49(4) of the 1906 *Indian Act* to withhold its own consent to the surrender. We conclude that the Governor in Council in fact ought to have withheld consent.

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[207] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 39-40 (SCC), McLachlin J. Emphasis added.

[208] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 31 (SCC), Gonthier J.

The views expressed by various Indian Affairs officials on the wisdom of surrendering the Band's land represent a good starting point for determining whether the Governor in Council ought to have consented to the surrender. It will be recalled that, as early as 1886, in response to a proposal that would have seen the Crooked Lake Bands give up the southern portions of their reserves in exchange for greater river frontage, Indian Agent Alan McDonald commented:

> Loud Voice and Kah-ke-wis-ta-haw bands would also be giving up the best of their hay, but not to the same extent as "Little Childs".
>
> These bands should in a few years possess large number of cattle requiring several thousand tons of Hay each, and we should in every way possible protect it for them. . . .
>
> We should not overlook the fact that *should the proposition be carried out, the Indians will be giving up far more valuable lands than they will be receiving*.[209]

In 1891, when local residents presented a petition to the Minister of Interior calling for the surrender of the southern hay lands in the three Crooked Lake reserves, McDonald was both prophetic and alert to his fiduciary responsibilities in his response on the merits of the proposed surrender:

> . . . although I am most anxious that the views of the people of Broadview should be met, still from my position as Indian Agent I am bound in the interests of the Indians to point out the difficulties in the way, which are tersely these. *If these lands are surrendered by the Indians, no reasonable money value can recompense them, as their*

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[209] A. McDonald, Indian Agent, to Indian Commissioner, March 22, 1886, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 84-85). Emphasis added.

> *Hay lands would be completely gone, and this would necessitate no further increase of stock, which would of course be fatal to their further quick advancement, and would be deplorable, and the only alternative that I can see is to give them Hay lands of equal quantity and value immediately adjacent to the Reserves interested, which I do not think is possible now. . . .*
>
> If it was contemplated by the Committee that waited upon you on the 26th ultimo to have the whole of Township 17 in Ranges 3, 4, 5 & part of 6 surrendered, *I would beg to point out that very little of the whole Reserve remains.*[210]

In 1902, Commissioner Laird cautioned that, given the rising importance of cattle operations among Kahkewistahaw's people and the need for the southern hay lands for this purpose, "it would never do to have the Indians short of hay."[211] Two years later, Assistant Indian Commissioner McKenna could not have made himself more clear when, referring to an earlier report by Laird, he stated:

> I would point out that the Commissioner in his report of the 6th of May 1902 stated that there was a good deal of force in the remarks of some of the Indians; that the best of the land in Reserves 71 & 72 was contained in the part asked to be surrendered; and that the best wood was also on the South of the Reserves. This being so it would not be advisable, from an Indian standpoint, to dispose of the land.[212]

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[210] A. McDonald, Indian Agent, to Superintendent General of Indian Affairs, March 10, 1891, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 118-20). Emphasis added.

[211] David Laird, Indian Commissioner, to Magnus Begg, Indian Agent, January 22, 1902, NA, RG 10, vol. 3561, file 82, part 4 (ICC Documents, pp. 163-64).

[212] J.A. McKenna, Assistant Indian Commissioner, to Secretary, Department of Indian Affairs, March 19, 1904, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 200).

These comments were echoed 90 years later in the report and testimony of David Hoffman, who stated that the Band not only surrendered the majority of its reserve land base but was asked to give up the very best land on the reserve - the southern lands which had been favourably mentioned in official reports and which had been coveted for so long by the neighbouring settlements. As we have already remarked, the superiority of the surrendered lands would have been just as obvious - if not more so - to an observer at the time of the surrender as it is today. Moreover, unlike the situation in *Apsassin*, where reserve lands were sold for the express purpose of replacing them with other lands more suited to the Band's requirements, in Kahkewistahaw's case there were no alternative lands of similar quantity and quality available for the Band to purchase with the sale proceeds from the surrendered lands.

By allowing the Kahkewistahaw Band to surrender its best hay lands, Canada deprived the Band of an opportunity to become self-sufficient through agriculture and cattle ranching. The surrender occurred at a time when the Band had engaged in cattle ranching as a burgeoning commercial venture, when the introduction of new strains of faster-maturing wheat and new farming technologies were beginning to transform the western Canadian economy, and when the Kahkewistahaw Band was reportedly becoming less dependent on rations and other forms of government assistance. In fact, it was the high quality of the surrendered lands and the prosperity that could be gained from them which ironically provided the driving force for the surrender. The problem is that it was not the Kahkewistahaw Band that was allowed to reap these profits.

Canada's rejoinder is that the surrender was not foolish, improvident, or exploitative at the time of the surrender in 1907 because the dramatic decline in the population of the Band from the time of treaty would have left the Band with approximately 160 acres of reserve land per person after the surrender (an area in excess of the treaty requirement of 128 acres per person). Furthermore, counsel for Canada submitted that the surrender and sale of 70 per cent of the reserve was reasonable since the Band could no longer sustain its farming operations in any event:

> The evidence indicates that at least several years prior to the surrender, the Band had incurred debts for wagons, harnesses and machinery. Without the necessary machinery and equipment, the Band could not obtain the necessary feed for the cattle which prevented them from increasing their herds and having surplus cattle to provide clothing, lumber and necessary provisions. Further, it appears that the reserve was in need of fencing to prevent stray animals from grazing on the Reserve Lands. In short, the Band lacked the resources to improve or further its development.[213]

Canada asserted that the money received from the sale of the surrendered lands, and the periodic distributions of interest accruals, benefited the entire Band, particularly the elderly who had no other source of income.[214]

At first blush, the factors identified by Canada might appear to provide valid justification for the impugned surrender. However, we find Canada's first argument – that the transaction was not improvident in light of the Band's reduced population – to be completely without merit for two reasons.

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[213] Submissions on Behalf of the Government of Canada, January 26, 1996, p. 43.

[214] Submissions on Behalf of the Government of Canada, January 26, 1996, pp. 43-44.

First, this argument imports principles of treaty land entitlement to justify the surrender and ignores the fact that a band's treaty land entitlement is normally established based on its population at date of first survey. In the Commission's recent report dealing with Kahkewistahaw's treaty land entitlement claim, we found that the First Nation's date-of-first-survey population was at least 256, including an 1881 base paylist population of 186, together with 70 absentees and arrears. This figure does not include possible new adherents to treaty and transfers from landless bands, who, in accordance with the principles developed by the Commission in the Fort McKay, Kawacatoose, Lac La Ronge, and Kahkewistahaw treaty land entitlement inquiries, would also be entitled to be counted for the purposes of establishing the First Nation's treaty land entitlement. After the 1907 surrender, Kahkewistahaw's reserves were reduced by 33,281 acres – from 46,816 to 13,535 acres – which left the First Nation with sufficient land for just 105 people. Although the evidence shows that, owing to starvation and disease, Kahkewistahaw's population had declined to fewer than 105 in 1907, the suggestion that the reduced reserve satisfied the reduced population in 1907 runs afoul of one of the Commission's conclusions in the Fort McKay report:

> 5 *After the date of first survey, natural increases or decreases in the population of the band do not affect treaty land entitlement.* Thereafter it is only late adherents or landless transfers in respect of whom treaty land has never been allocated that will affect treaty land entitlement.[215]

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[215] Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), 5 ICCP 3 at 53. Emphasis added.

In our view, Canada's argument is a red herring and is entirely inconsistent with the proper interpretation of the reserve clause in Treaty 4. Moreover, we find it offensive that Canada in 1907 sought to take advantage of the fact that so many of the Band's members had perished. We refuse to make a finding that, because the Band's population had been decimated by starvation and disease, the government was legally or morally justified in participating in a process that stripped Band members of most of the lands selected by their forefathers in accordance with the treaty.

Second, this argument by Canada is even more inconsistent with the treaty when considered on qualitative grounds. In the 1907 surrender, Kahkewistahaw not only gave up more than 70 per cent of its reserve lands but also surrendered almost 90 per cent of the arable land on the reserve. This fact is readily apparent from a review of the map of the surrendered lands which accompanies this report and from the report and evidence of David Hoffman.[216] Even if there *was* sufficient land for the 1907 population of 84, the acreage of *quality* land was surely far below the treaty formula of 128 acres per person. This surrender was unfair in every sense of the word and we do not require the benefit of hindsight in reaching this conclusion. The unfairness must have been just as evident in 1907 as it was when the Commission recently viewed the area. Moreover, the fact that the lands were to be sold at public auction is beside the point. There was no reason for the Band to give up these lands and no justifiable reason for inducing it to do so.

With regard to Canada's second submission – that the surrender was reasonable rather than foolish or improvident, since the Kahkewistahaw Band was unable to sustain or improve upon its previous levels of economic activity in any event – we are not satisfied that such a conclusion would have justified selling off the Band's primary capital asset and only source of income. Moreover, we do not believe that we have the necessary economic evidence before us to be able to assess this point. Nevertheless, even if the Band received fair market value for the surrendered lands, which likewise has not been demonstrated conclusively one way or the other on the limited evidence before us, the adequacy of the consideration received by the Band is not the central issue. The essence of the matter is that it should have been obvious to the Crown that the surrender of the Band's best agricultural land made little or no sense when viewed from the perspective of the Band's best interests.

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[216] Hoffman & Associates Ltd, "Comparison of Soils between Surrendered and Non-Surrendered Areas of Kahkewistahaw," undated, p. i (Summary of Salient Facts).

In conclusion, we find that this surrender transaction was foolish, improvident, and exploitative, and that the consent of the Governor in Council under subsection 49(4) should properly have been withheld.

PART V

CONCLUSIONS AND RECOMMENDATION

We have been asked to inquire into and report on whether the Government of Canada properly rejected the specific claim submitted by the Kahkewistahaw First Nation, or, alternatively, whether it owes an outstanding lawful obligation to the First Nation. We have concluded that the surrender of a portion of IR 72 by the Kahkewistahaw Band in 1907 was valid and unconditional, which means that the First Nation's aboriginal interest in the surrendered land has been extinguished.

We also find, however, that Canada owed pre-surrender fiduciary obligations to the Kahkewistahaw First Nation and that it breached those obligations. In procuring the surrender, Canada's agents engaged in "tainted dealings" by taking advantage of the Band's weakness and lack of leadership to induce its members to consent to a surrender that, for a period of 22 years, they had steadfastly refused. Moreover, the Band effectively ceded or abnegated its decision-making power to or in favour of Canada with respect to the surrender, but Canada failed to exercise that power conscientiously and without influencing the outcome of the surrender vote. Finally, when offered the opportunity under subsection 49(4) of the 1906 *Indian Act* to reject a surrender that was clearly foolish and improvident and constituted exploitation, the Governor in Council failed to do so. In short, Canada breached its fiduciary obligations by subordinating the interests of the Band to the interests of the surrounding communities as well as Canada's own political interests.

RECOMMENDATION

We find that this claim discloses a breach of Canada's fiduciary obligation to the Kahkewistahaw First Nation. We therefore recommend to the parties:

> **That the claim of the Kahkewistahaw First Nation be accepted for negotiation under the Specific Claims Policy.**

For the Indian Claims Commission

Roger Augustine

P.E. James Prentice, QC
Commission Co-Chair

Roger J. Augustine
Commissioner

When we made the treaty at Qu'Appelle you told me to choose out land for myself and now you come to speak to me here. We were told to take this land and we are going to keep it. Did I not tell you a long time ago that you would come some time, that you would come and ask me to sell you this land back again, but I told you at that time, No.

– Chief Kahkewistahaw, May 6, 1902